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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 18, 146

(T.D. 84-207)

Customs Regulations Amendments Relating to Textiles and Textile Products; In-Bond Movements; Foreign-Trade Zones

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations, solicitation of comments, extension of comment period.

SUMMARY: Section 204 of the Agricultural Act of 1956 grants authority to the President to negotiate agreements with foreign governments limiting exports of textiles and textile products from such countries into the U.S. The Act also grants authority to issue regulations governing the entry into the U.S. of articles covered by the agreements. Executive Order 12475 of May 9, 1984, delegated that authority to the Secretary of the Treasury and directed that the regulations be promulgated within 120 days of the May 11, 1984, effective date of the Executive Order. On August 3, 1984, interim Customs Regulations were published in the Federal Register (49 FR 31248) as T.D. 84-171. The regulations amended the Customs Regulations to prevent circumvention or frustration of visa or export license requirements contained in mutilateral and bilateral agreements to which the U.S. is a party in order to facilitate the efficient and equitable administration of the U.S. Textile Import Program. Based upon public comments received in response to the solicitation of comments provision of the interim regulations, it has been decided to modify them to eliminate the requirement of presentation of the visa or export license before an in-bond movement is approved and include a listing of specific information which will assist district directors in making their determination of whether or not to approve an in-bond movement or examine the merchandise. It has also been decided to modify the foreign-trade zones provisions of the interim regulations to include a phrase which recognizes the existing statutory authority of the Foreign-Trade Zones Board.

EFFECTIVE DATE: These interim regulations are effective for all textiles and textile products subject to section 204, Agricultural Act of 1956, as amended, exported from the country of origin, as defined by section 12.130, Customs Regulations (19 CFR 12.130), on or after September 7, 1984.

COMMENTS: Written comments received on or before November 1, 1984, will be considered in determining whether any further changes to the interim regulations are required before a final rule is published. Based upon numerous requests for additional time to comment on the interim regulations published in the Federal Register on August 3, 1984 (49 FR 31248), as T.D. 84-171, it has been decided to extend the close of the comment period for that document from october 2, 1984, to November 1, 1984.

ADDRESS: Written comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Part 18: Kent Parsell, Inspection and Control Division (202-566-5354);

Part 146: John Holl, Office of Cargo Enforcement Facilitation (202-566-8151);

U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In order to implement import policies with respect to textiles and textile products, Congress provided authority to the President to negotiate textile restraint agreements in section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and authority to carry out such agreements by issuing regulations governing the entry of merchandise covered by the agreements into the U.S.

In December, 1973, representatives of 50 nations meeting under the General Agreement on Tariff and Trade (GATT) aegis, negotiated the Multi-Fiber Arrangement Regarding International Trade in Textiles. The arrangement is usually known as the Multi-Fiber Arrangement, or MFA, and came in force on January 1, 1974. It was subsequently renewed and next expires on July 31, 1986.

Under the MFA, the U.S. has negotiated bilateral restraint agreements with 28 countries. The U.S. also has bilateral agreements with 8 MFA non-signatories. The Committee for the Implementation of Textile Agreements (CITA) was established by Executive Order 11651 on March 3, 1972, to supervise the implementation of textile agreements.

In recent months the U.S. Customs Service has been faced with an ever increasing number and variety of instances where attempts have been made to circumvent the Textile Import Program. Many of these attempts to circumvent the Textile Import Program have involved the use of the in-bond movement procedures set forth in Part 18, Customs Regulations (19 CFR Part 18).

In part, because of these problems, to prevent circumvention or frustration of the various multilateral and bilateral agreements to which the U.S. is a party, and to facilitate efficient and equitable administration of the U.S. Textile Import Program, the President signed Executive Order 12475 on May 9, 1984. Under the Executive Order the Secretary of the Treasury was required to promulgate regulations governing the entry of textiles and textile products subject to section 204 of the Agricultural Act of 1956 within 120 days of the May 11, 1984, effective date of the Executive Order. On August 3, 1984, a document was published as T.D. 84-171 in the Federal Register (49 FR 31248), which promulgated interim Customs Regulations amendments pursuant to the Executive Order. The document invited public comments on the interim regulations until October 2, 1984. That comment period is now being extended by this document to November 1, 1984. During the comment period, Customs has been and will continue to review comments as they are received to determine if any problem arises which requires immediate action.

Accordingly, in order to alleviate unnecessary hardships to persons (individuals, partnerships, or corporations) in the U.S. who had made binding commitments for a fixed quantity of merchandise prior to publication of the interim regulations, the effective date as it relates to the provisions of section 12.130 was modified, by a document published in the Federal Register on August 29, 1984 (49 FR 34199) as T.D. 84-190, subject to the terms and conditions as set forth in the document, to October 31, 1984.

Another area which has been looked at closely by Customs has been the in-bond procedures set forth in section 18.11 of the interim regulations. In the August 3, 1984, Federal Register document it was indicated that because of the numerous instances identified by Customs in which the provisions of the regulations relating to in-bond transportations have been used to frustrate and circumvent the textile and textile products visa or export license requirements, district directors have been advised to strictly enforce the provisions of § 18.11(h), Customs Regulations (19 CFR 18.11(h)). To insure the applicability of these requirements, § 18.11(e) was amended by the interim regulations to incorporate the provisions of § 18.11(h). In addition, § 18.11(e) was amended to require the visa or export license, if applicable, to be presented with the entry. Section 6.18, Customs Regulations (19 CFR 6.18), relating to documentation for transit air cargo, was amended to cross-reference the requirements of § 18.11 (e) and (h).

Customs has received numerous comments in response to the solicitation of comments provision of the interim regulations regarding the presentation of the visa or export license prior to movement of textiles and textile products under the in-bond procedures. Based upon a review of these comments, it has been concluded that compliance with the requirement would be difficult. Accordingly, Customs has decided to delete this requirement.

Further, the commenters expressed concern about the example of the rated invoice used in the interim regulations to indicate the type of evidence the district director could use to satisfy himself of the approximate correctness of the value and quantity stated in the in-bond entry. The rated invoice was chosen as an example not because of a need for this particular document but because it contained most of the information necessary for Customs to accurately assess the risk of possible diversion during the in-bond movement. Because the example has generated so much adverse comment and concern, it has been decided to delete it and specifically list, by way of example, the information which Customs will use in making the determination of whether or not to examine the merchandise and whether or not to approve the in-bond movement. This information includes:

(a) Detailed quantity description (e.g., 14 cartons, 2 dozen per carton),

(b) Detailed description of the textiles or textile products including type of commodity and chief fiber content (e.g., men's cotton jeans or women's wool sweaters),

(c) Net weight of the textiles or textile products (including immediate packing but excluding pallets),

(d) Total value of the textiles or textile products,

(e) Manufacturer or supplier,

(f) Country of origin,

(g) Name(s) and address(es) of the person(s) to whom the textiles and textile products are consigned, and

(h) Harmonized code tariff number (when available).

The harmonized code tariff number, if provided, will greatly assist Customs in determining the proper classification of the merchandise and the visa requirements. Not providing any one or all of the foregoing will not in and of itself result in a denial of the in-bond movement or examination of the merchandise. It will, however, be a factor considered by the district director along with all other facts and circumstances available as to the risk to the revenue, potential for diversion of the merchandise, and proper enforcement of the Textile Import Program.

The information may be provided to Customs by the carrier or his agent or the importer. If this information is available on existing documentation such as an invoice, a bill of lading, etc., providing a copy of that document, will assist Customs in the consideration of whether or not to approve the movement or to examine

the merchandise. In lieu of the foregoing, the information could be included on the in-bond document itself or a plain piece of paper. This flexible approach will allow the importer to determine the manner in which the information will be supplied.

Further, Customs has also decided that to effectively enforce these interim regulations and ensure that shipments of textiles and textile products arrive intact, no diversion from the destination, as shown on the in-bond document, will be allowed without the permission of the district director at the port of origin of the in-bond movement. This requirement provides Customs with the administrative control over shipments of textiles and textile products necessary to effectively ensure that those products subject to quota are not diverted into the commerce of the U.S. in violation of such quota. While the privilege of in-bond movement provided under 19 U.S.C. 1552 is statutorily denied for prohibited merchandise, textiles or textile products imported in excess of quota are not deemed to be prohibited until they arrive at the port at which entry is to be filed. As a result, such textile shipments, which will become prohibited merchandise at the port where the entry is filed, are, in fact, allowed to transit through the U.S. where they may be diverted into the commerce of the U.S. Although, historically, the bonding mechanism protected the government from such diversion, because the bond protected against a loss of revenue, with respect to quota merchandise the bond provides an inadequate remedy under the law. This is because the quota agreements are not concerned with revenue but, rather, with prohibiting introduction of those textiles and textile products into the commerce of the U.S. This new requirement is designed to ensure that the diversion of such merchandise does not occur. This change is set forth as an amendment to § 18.5, Customs Regulations (19 CFR 18.5) and is included in this document.

The interim regulations published on August 3, 1984, also contained an amendment to the foreign-trade zones regulations found in Part 146, Customs Regulations (19 CFR Part 146), to prevent use of foreign-trade zones to frustrate or circumvent quota or visa or export license requirements. The provision set forth in § 146.49 specifically provided that textiles and textile products admitted into a foreign-trade zone, regardless of whether the merchandise has privileged or nonprivileged foreign status, which would have been subject to quota or visa or export license requirements in their condition at the time of importation if entered for consumption rather than admitted to a foreign-trade zone, may not be subsequently transferred into the customs territory for consumption if during the time the merchandise is in the foreign-trade zone there has been a change by manipulation, manufacture, or other means:

(a) in the country of origin of the merchandise as defined by section 12.130 of the interim regulations,

(b) to exempt from quota or visa or export license requirements other than a change brought about by statute, treaty, executive order or Presidential proclamation, or

(c) from one textile category to another textile category.

Based upon public comment and after consultation with the Foreign-Trade Zones Board, it has been decided to modify the foreign-trade zones provisions of the interim regulations to include a phrase which recognizes the existing statutory authority of the Foreign-Trade Zones Board. The change is set forth as an amendment to § 146.49 of the interim regulations.

COMMENTS

Before adopting these interim regulations as a final rule, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), and § 1.6 Treasury Department Regulations (31 CFR 1.6), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations Control Branch, U.S. Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

INAPPLICABILITY OF NOTICE

Public notice is inapplicable to these regulations because they are promulgated pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and are thus within the foreign affairs function of the U.S. and the foreign affairs exemption of 5 U.S.C. 553(a)(1). These regulations are necessary to prevent circumvention or frustration of multilateral and bilateral agreements to which the U.S. is a party and to facilitate efficient and equitable administration of the U.S. Textile Import Program as authorized in section 204. For the above reasons it is also believed that pursuant to 5 U.S.C. 553(b)(B), notice and public procedures are impracticable, unnecessary and contrary to the public interest. The authority to promulgate these regulations was delegated by the President to the Secretary of the Treasury by Executive Order 12475.

EXECUTIVE ORDER 12291

This interim regulation is not a "major rule" as defined by section 1(b) of Executive Order 12291. Accordingly, a regulatory impact analysis is not required under E.O. 12291.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this document because it is believed the regu-

lation will not have a significant economic impact on a substantial number of small entities. However, public comment is requested on the effects, with numerical estimates, of the amendments on costs, profitability, competitiveness, and employment in small entities. Subsequent to the receipt of public comments, it will be decided whether the preparation of a final regulatory flexibility analysis is warranted. In light of the above, it is certified under the provisions of section 3, Regulatory Flexibility Act (5 U.S.C. 605(b)) that the interim regulations will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The interim regulation is subject to the Paperwork Reduction Act of 1980, Pub. L. 96-511. Accordingly, applicable sections of the interim regulation have been cleared by the Office of Management and Budget and assigned control number 1515-0140.

Drafting Information

The principal author of this document was John Elkins, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects

19 CFR Part 18

Common carriers, Customs duties and inspection, Freight forwarders, Imports.

19 CFR Part 146

Customs duties and inspections, Foreign-trade zones, Imports.

Amendments to the Regulations

Parts 18 and 146, Customs Regulations (19 CFR Parts 18, 146), are amended as set forth below.

William von Raab,
Commissioner of Customs.

Approved: September 7, 1984.

John M. Walker, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 28, 1984 (49 FR 38245)]

Part 18—Transportation In-Bond and Merchandise In-Transit

1. Section 18.5(a) is amended by removing the words "and (e)" in the second sentence and inserting, in their place, the words "(e) and (f)".

2. Section 18.5 is further amended by adding a paragraph (f) to read as follows:

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18.5 Diversion.

* * * * * * *

(f) The diversion of in-bond shipments, which contain textiles or textile products subject to section 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854), during the in-bond movement shall be allowed only upon the prior written permission of the district director at the port of origin.

3. Section 18.11(e) is amended by removing the last three sentences, as added by T.D. 84-171, and inserting, in their place, the following:

18.11 Entry, classes of goods for which entry is authorized; form used.

* * * * * * *

Entries for immediate transportation without appraisement covering textiles and textile products subject to section 204, Agricultural Act of 1956, as amended (7 U.S.C. 1854), shall be described in such detail as to enable the district director to estimate the duties and taxes, if any, due. The district director may require evidence to satisfy him of the approximate correctness of the value and quantity stated in the entry (e.g. Detailed quantity description (e.g., 14 cartons, 2 dozen per carton); Detailed description of the textiles or textile products including type of commodity and chief fiber content (e.g., men's cotton jeans or women's wool sweaters); Net weight of the textiles or textile products (including immediate packing but excluding pallets); Total value of the textiles or textile products; Manufacturer or supplier; Country of origin; Name(s) and address(es) of the person(s) to whom the textiles and textile products are consigned; Harmonized code tariff number (when available)).

(R.S. 251, as amended, sec. 484, 46 Stat. 722, as amended, sec. 624, 46 Stat. 759, sec. 204, 70 Stat. 200, as amended (19 U.S.C. 66, 1484, 1624, 7 U.S.C. 1854))

PART 146—FOREIGN-TRADE ZONES

Section 146.49, as added by T.D. 84-171, is amended by removing the word "Textiles" and inserting, in its place, the words "Subject to the existing statutory authority of the Foreign-Trade Zones Board, textiles".

(R.S. 251, as amended, sec. 8, 48 Stat. 1000, sec. 484, 46 Stat. 722, as amended, sec. 624, 46 Stat. 759, sec. 204, 70 Stat. 200, as amended (19 U.S.C. 66, 81h, 1484, 1624, 7 U.S.C. 1854))

(T.D. 84-208)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued August 1, 1984, to September 21, 1984, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and 2 approvals under T.D. 84-49.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: September 27, 1984.

File: 217333.

EDWARD B. GABLE, JR.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Abbott Laboratories
Articles: Thiopental Sodium Penyoba (Pentothal)
Merchandise: Acid Thiopental
Factory: North Chicago, IL
Statement signed: August 3, 1984
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Chicago, August 22, 1984

(B) Company: Air Products and Chemicals, Inc.
Articles: Monoisopropylamine (MIPA); Diisopropylamine (DIPA)
Merchandise: Isopropanol (IPOH)
Factory: St. Gabriel, LA
Statement signed: August 24, 1984
Basis of claim: Used in, with distribution of drawback to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: New York, September 20, 1984

(C) Company: Bofors Nobel, Inc.
Articles: Dichlorobenzidine Dihydorchloride (DCB)
Merchandise: Ortho-Nitro Chlorobenzene (ONCB)
Factory: Muskegon, MI

Statement signed: June 15, 1984
Basis of claim: Used in Rate forwarded to Regional Commissioner of Customs: Chicago, August 6, 1984
Revokes: T.D. 76-249-F

(D) Company: Campbell Soup Company
Articles: Can bodies
Merchandise: Electrolytic tin plate
Factories: Sacramento, CA; Chicago, IL; Camden, NJ; Maxton, NC; Napoleon, OH; Paris, TX
Statement signed: August 13, 1984
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), August 20, 1984

(E) Company: The Dow Chemical Company
Articles: Polymerized Styrene (STYRON)
Merchandise: Styrene monomer
Factories: Torrance, CA; Gales Ferry, CT; Joliet, IL; Midland, MI; Pevely, MO; Ironton, OH
Statement signed: April 10, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Chicago, August 23, 1984

(F) Company: The Dow Chemical Company
Articles: Methylene Chloride and Chloroform
Merchandise: Methanol
Factories: Midland, MI; Plaquemine, LA; Freeport, TX
Statement signed: July 6, 1984
Basis of claim: Used in, with distribution of drawback to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Chicago, August 22, 1984

(G) Company: E. I. du Pont de Nemours and Company
Articles: Various herbicides
Merchandise: Triazine, sulfonamide, and sugar
Factory: Belle, WV
Statement signed: July 11, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), September 5, 1984

(H) Company: Eli Lilly and Company
Articles: Cefaclor Monohydrate; Cefaclor Anhydrate; Cefaclor Intermediate; Cefaclor Monohydrate for Dry Products; Ceclor (Cefa-

clor) for Oral Suspensions; Pulvules Ceclor (Cefaclor); P-Nitrobenzyl Ester of PVSO

Merchandise: D-Alpha Phenylglycine Levorotatory; Dimethyl Formamide; Triethylamine; Semicarbazide Hydrochloride; Methyl Acetoacetate; Penicillin V Potassium Intermediate; Cefaclor Intermediate; P-Nitrobenzyl Bromide; Phenylglycine Derivative Sodium Salt; Phenoxyacetic Acid; Potassium Acetate Solution 80%; Potassium Acetate Tech; Potassium Bicarbonate; Sodium Chloroacetate Tech; Exomethylene Ceph V Sulfoxide Ester; Enol Sulfoxide Ester; 7-Amino-3-Cephem-Ester HCL; Hexane; Isopropyl Alcohol; Methyl Alcohol; Triphenylphosphite; Potassium Bicarbonate Powder; Potassium Carbonate; Methyl Chloroformate; p-Nitrobenzyl Ester of PVSO; Tetrabutylammonium Bromide; Quinoline; Potassium Iodide Granulated

Factories: Lafayette, Clinton, and Indianapolis, IN

Statement signed: August 24, 1984

Basis of claim: Used in

Rate forwarded to Regional Commissioner of Customs: Chicago, September 12, 1984

Revokes: T.D. 83-257-H

(I) Company: Exxon Corporation, Exxon Chemical Americas Division

Articles: Refined Naphthenic Acid 220-230

Merchandise: Naphthenic Acid 195-205

Factory: Galena Park, TX

Statement signed: August 16, 1984

Basis of claim: Used in

Rate forwarded to Regional Commissioner of Customs: Houston, August 28, 1984

(J) Company: Fleischmann Malting Co., Inc.

Articles: Cleaned Barley Malt

Merchandise: Raw Six Row Malting Barley

Factories: Minneapolis, and Redwing, MN; Detroit, MI; Chicago, IL

Statement signed: May 16, 1984

Basis of claim: Used in, less valuable waste

Rate forwarded to Regional Commissioner of Customs: Chicago, September 11, 1984

(K) Company: GNB Batteries, Inc., Metals Division

Articles: Lead oxide, antimonial lead, and pig lead (processed)

Merchandise: Pig lead, metallic antimony

Factories: Los Angeles, CA; Frisco, TX; St. Paul, MN

Statement signed: May 16, 1984

Basis of claim: Appearing in

Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, August 1, 1984
Revokes: T.D. 81-156-J, to cover successorship from Gould, Inc

(L) Company: Harris Corporation
Articles: Partially and fully fabricated semiconductor wafers; finished semiconductor devices
Merchandise: Raw silicon wafers
Factory: Palm Bay, FL
Statement signed: May 10, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), September 21, 1984
Revokes: T.D. 80-280-H

(M) Company: International Paper Company
Articles: Bleached and/or unbleached pulp; Bleached and/or unbleached paper; Bleached and/or unbleached paperboard; Corrugated fibreboard; Corrugated shipping containers
Merchandise: Sodium chlorate; Sodium chlorate/sodium chloride mixture; Liquid sodium hydroxide solution (50 percent liquid caustic soda); Liquid chlorine; Chemfibre; Kraft liner board
Factories: 16 locations, see p. 1, contract
Statement signed: May 24, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, August 28, 1984
Revokes: T.D. 79-281-M

(N) Company: Kurz-Hastings, Inc.
Articles: Hot Stamping Foil
Merchandise: Polyester Film
Factory: Philadelphia, PA
Statement signed: June 18, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), August 1, 1984
Revokes: T.D. 69-240-V as amended by T.D. 74-179-M

(O) Company: NF and M International
Articles: Finished titanium billets, bars, and plates
Merchandise: Titanium ingots, billets, and bars of specified compositions
Factory: Monaca, PA
Statement signed: June 8, 1984
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, August 30, 1984
Revokes: T.D. 83-259-V

(P) Company: Nikko Wolverine Inc.
Articles: Zirconium products; titanium products; tubes; welded tubes; tubes with copper bonded cores (ti clad)
Merchandise: Zirconium billets; Copper tubes; Copper billets; Titanium tubes, copper clad; Titanium welded tubes: Titanium billets
Factory: Dearborn Heights, MI
Statement signed: June 15, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, August 2, 1984
Revokes: T.D. 83-255-Q

(Q) Company: Pacific Smelting Company
Articles: Zinc oxide, dust, anodes, skimmings and zinc aluminum alloy bars
Merchandise: Zinc in various forms
Factories: Torrance, CA; Millington, TN
Statement signed: July 9, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Los Angeles, August 7, 1984

(R) Company: Phillips Petroleum Company
Articles: Bunker fuel
Merchandise: Distillate and residual oils
Factory: Freeport, TX
Statement signed: June 29, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Chicago, August 23, 1984

(S) Company: Rhone-Poulenc Inc.
Articles: Unexposed Microfilm
Merchandise: Polyester and Triacetate Films
Factory: Rochester, NY
Statement signed: June 18, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, September 6, 1984

(T) Company: Riegel Textile Corporation
Articles: Indigo denim cloth
Merchandise: Indigo normal powder
Factory: Trion, GA
Statement signed: January 30, 1984
Basis of claim: Appearing in

Rate forwarded to Regional Commissioner of Customs: Miami, August 22, 1984

(U) Company: Sandvik, Inc.
Articles: Tungsten Carbide Inserts
Merchandise: Tungsten Carbide Powder, various grades, to be substituted on a grade-for-grade basis
Factory: Fair Lawn, NJ
Statement signed: June 1, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, August 21, 1984

(V) Company: Sartomer Company
Articles: Trimethylolpropane Trimethacrylate;
Trimethylolpropane Triacrylate; 1,6 Hexanediol Dimethacrylate; 1,6 Hexanediol Diacrylate; Zinc Dimethacrylate; Zinc Diacrylate
Merchandise: Trimethylolpropane (TMP); 1,6 Hexanediol (1,6 HDO); Zinc Oxide (OZN)
Factories: West Chester, PA; Stratford, CT
Statement signed: June 12, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, August 3, 1984
Revokes: T.D. 72-152-Q and T.D. 75-56-W

(W) Company: Sterling Drug Inc.
Articles: Hypaque acid, anhydrous; hypaque meglumine; and hypague sodium
Merchandise: 3,5 dinitrobenzoic acid
Factory: Rensselaer, NY
Statement signed: May 22, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, August 27, 1984
Revokes: T.D. 82-86-U

(X) Company: Union Carbide Agricultural Products Co., Inc.
Articles: 3+3 Brominal; Liquid Amizine; Amitrol T; Liquid X-ALL; Fruitone CPA; Base 257; Desormone LV 700
Merchandise: Bromoxynil Technical; Bromoxynil Butyrate; Bromoxynil Octanoate; 3-Chlorophenoxy Propionic Acid; 2-4 Dichlorophenoxy Propionic Acid, Butoxyethyl Ester; Animotriazole
Factory: St. Joseph, MO
Statement signed: April 6, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, September 6, 1984
(Y) Company: Uniroyal, Inc.

Articles: Coated Fabrics
Merchandise: Chemicals; Synthetic Rubber; Fabrics; all made to exact specifications and identified by code number
Factories: Mishawaka, IN; Stoughton, WI; Port Clinton, OH
Statement signed: February 13, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, August 24, 1984

(Z) Company: Whittaker Corp., Heico Div.
Articles: Cyanoethyl benzoic acid
Merchandise: Ortho-chlorobenzoic acid
Factory: Delaware Water Gap, PA
Statement signed: July 23, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, September 10, 1984

Approvals under T.D. 84-49

(1) Company: Chevron, U.S.A. Inc.
Articles: Petrochemicals and Petroleum Products
Merchandise: Crude Petroleum Classes I through IV; Unfinished Petroleum Products, Classes II through IV
Factories: Nine refineries; Four secondary manufacturing plants, see p. 2 of contract
Statement signed: July 12, 1984
Basis of claim: As provided in the drawback rate contained in T.D. 84-49
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), August 23, 1984
Revokes: T.D. 83-259-1

(2) Company: Clark Oil and Refining Corporation
Articles: Motor gasoline, distillate oils, residual oils and liquefied refinery gas
Merchandise: Crude petroleum and petroleum derivatives
Factory: Wood River, IL
Statement signed: July 23, 1984
Basis of claim: As provided in the drawback rate contained in T.D. 84-49
Rate forwarded to Regional Commissioner of Customs: Houston, August 16, 1984

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19 CFR Part 172

(T.D. 84-209)

Customs Regulations Amendment Relating to Relief From Certain Liquidated Damages Claims

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide that claims for liquidation damages for the failure to file timely entry summaries after the release of merchandise under an entry or an immediate delivery permit are to be demanded and cancelled pursuant to guidelines published by the Commissioner of Customs. This change is necessary in order to have the regulations reference the guidelines, thereby ensuring uniform and consistent disposition of these liquidated damages claims.

EFFECTIVE DATE: November 2, 1984.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Miscellaneous Penalties Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5746).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In accordance with section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), and Part 142, Customs Regulations (19 CFR Part 142), merchandise may be released from Customs custody before the deposit of duty and the submission of complete entry documentation. When an importer elects to use this procedure, the entry summary, together with the deposit of estimated duties and taxes due, must be submitted to Customs within 10 working days of release of the merchandise. An importer filing the entry summary late is subject to a demand under his Customs bond for liquidated damages in the amount of the value of the merchandise plus the duties and taxes owing. In such cases, under section 623, Tariff Act of 1930, as amended (19 U.S.C. 1623), and Part 172, Customs Regulations (19 CFR Part 172), the importer is afforded the opportunity to petition for relief from the payment of liquidated damages.

Customs initially set forth guidelines for the disposition of violations of the timely entry summary filing requirement by T.D. 80-298, published in the Customs Bulletin on December 24, 1980. These guidelines, however, resulted in certain inequities, prompting Customs to revise them. New guidelines were initially set forth in Manual Supplement 4400-11, issued to all Customs offices on April 20, 1983. They were subsequently published as Treasury Deci-

sion 83-117 in the Customs Bulletin dated June 1, 1983. They will be included in the 1985 revision of the Customs Fines, Penalties, and Forfeitures Handbook.

The new guidelines retained the basic concept of the previous guidelines under which the petitioner has two options available to him in resolving the demand for liquidated damages.

Under option 1, the violator may pay a specified sum within 60 days of the date of receipt of notice of the demand for liquidated damages and the case will be closed. By electing this option, the violator waives his right to file a petition. He may, however, file a petition after payment of the claim if he does so in accordance with the Customs Regulations and if he has some new fact or information which merits consideration. Under this option, for a dutiable entry where the entry summary is filed late, the specified sum will be $50 plus interest on the withheld duties at the rate of 0.1 percent (.001) per calendar day that the entry summary and/or duty were late. The specified sum for an entry for which there are no withheld duties (including a duty-free entry and a dutiable entry rejected, refiled late with no withheld duties) will be $50.

Under option 2, the violator may file a petition; but he generally would not be granted more relief than he would receive by paying the specified sum of option 1. If the entry summary is late by less than 30 days, the district director will grant further relief only when the petitioner has demonstrated either that the violation did not occur, or that the violation was the result of Customs error. If the entry summary is late by 30 days or more, the district director may consider the following factors in response to a petition for relief:

1. The circumstances causing the delay;
2. The extent of the lateness;
3. The amount of duty withheld;
4. The past record of the violators in filing entry summaries timely; and
5. The violator's lack of intent to file his entry summary late (an uncorroborated statement to this effect will generally be insufficient).

Ordinarily, mitigation granted under option 2 will not be in an amount less than the specified sum of option 1 unless the petitioner has presented extraordinary mitigating factors which justify such action.

Section 172.22(d), Customs Regulations (19 CFR 172.22(d)), provides for the manner in which a district director may act upon applications for relief from liquidated damages claims assessed for the failure to file timely an entry summary after release of merchandise under an entry or an immediate delivery permit. Section 172.22(d)(1) presently provides, in part, that if a district director is satisfied that the delay in filing the entry summary was not deliberate, he may cancel the claim for liquidated damages upon the

payment of an appropriate sum which shall not exceed 10 percent of the duty assessed, but which shall not be less than $25. If the situation warrants, authority to exceed 10 percent of the duty is vested in the Commissioner of Customs by § 172.22(d)(3).

Customs is amending § 172.22(d) to state that claims for liquidated damages for the failure to file timely entry summaries after the release of merchandise under an entry or on immediate delivery permit shall be demanded and cancelled pursuant to guidelines published by authority of the Commissioner.

Section 172.22(d) is also amended to provide that, in the case of an entry summary which has not been filed, the district director may not grant relief from a claim for liquidated damages until the entry summary has been filed.

A notice of proposed rulemaking on this subject was published in the Federal Register on July 27, 1983 (48 FR 34061), inviting public comments. A discussion of the five comments received and our responses follow.

Discussion of Comments

Comment: The guidelines should be incorporated in the Customs Regulations, so as to make them subject to review by the general public. Also, regulations which are based upon guidelines not made part of the regulations violate the Administrative Procedure Act.

Response: We disagree. Guidelines are a matter of administrative discretion as granted by section 623(c), Tariff Act of 1930, as amended (19 U.S.C. 1623(c)). To publish guidelines as inviolate standards would remove the element of discretion granted to the Secretary of the Treasury, and would therefore be contrary to the statute.

Also, the omission of the guidelines from the regulations does not violate the Administrative Procedure Act. No mitigation guidelines are published in the regulations themselves. The 19 U.S.C. 1497 and 19 U.S.C. 1592 guidelines are published as appendices to the regulations. Moreover, all such guidelines are readily available to the general public and will be incorporated in the Fines, Penalties, and Foreitures Handbook, a public document.

Comment: The new guidelines bar any use of discretion by the district director in deciding the mitigated amount to be paid by the violator. Also, § 172.22(d)(3), Customs Regulations, is inequitable in that it permits the district director, upon approval of the Commissioner, to take a mitigated amount in excess of the amount provided for by the guidelines. Section 172.22(d)(2) is inequitable in that it restricts cancellation of liquidated damages without payment of any mitigated amount to those cases in which the violation occurs *soley* because of Customs delay in returning the documents necessary to file an entry summary to the importer or broker. It does not take into account Customs contributory error.

Response: We disagree. First, the guidelines provide for discretion on the part of the district director in setting the mitigated amount in cases where the entry summary is filed 30 days late or more. In cases where the lateness is less than 30 days, there are very few reasons for the late filing other than the negligence of the importer or broker. In these cases, the district director intentionally was not given discretion in setting the mitigated amount, to discourage frivolous petitions.

Secondly, § 172.22(d)(3) does not permit the district director to take a mitigated amount greater than that set by the guidelines. Section 172.22(d)(3) provides that the case shall be referred to the Commissioner for disposition if the district director believes an amount in excess than that established in accordance with the guidelines is warranted. The decision as to an appropriate mitigated amount in such cases will be made by the Commissioner, not the district director.

Finally, we do not believe that § 172.22(d)(2) is inequitable because of its failure to consider Customs contributory error in a late filing violation. Customs cannot contribute to a late filing violation. If Customs error led to the petitioner's failure to file the entry timely, then Customs *caused* the late filing and cancellation of the claim for liquidated damages would be warranted under this regulation.

Comment: The basic $50 mitigated amount is too high and bears no relation to the loss of interest on duty that is deposited late along with the entry summary.

Response: The loss of the use of duty is not the sole reason for the penalty payment in these cases. While timely duty payment is important, the guidelines are also intended to deter the late filing of entry documentation and to partially compensate the Government for the administrative expenses incurred. The entry documentation is necessary for statistical and merchandise control purposes. Taking this into consideration, the $50 basic mitigated amount is fair. This amount, moreover, was established by Customs after consultation with the importing public, including brokers.

Comment: The mitigation guidelines should specify what type of data might "satisfy" the district director that the violation occurred solely because of delays by Customs in returning the necessary documents to the importer or broker.

Response: The commenter apparently is concerned about cases in which (1) entry summaries are presented to Customs but never returned to the importer or (2) entry summaries are delivered to Customs but claimed not to have been received.

This problem was resolved by issuing instructions to all Customs field offices, in Manual Supplement 4400–11, dated April 20, 1983, requiring institution of a date-stamping or receipt system, whereby entry summaries are stamped as received in front of the person filing the entry summary, or a receipt (validated broker copy) pro-

vided to the entry summary filer, as requested. Thus, the importer or broker would be able to prove timely filing of the entry summary, and any claim for liquidated damages for late filing would be canceled by Customs.

Comment: Section 172.22(d)(3) permits certain cases to be forwarded to the Commissioner for disposition. This ordinarily means a delegate of the Commissioner. However, no delegation order to a subordinate exists.

Response: Customs Delegation Order No. 1 (Revision 1), Amended (T.D. 80–63), expressly provides for delegation to the Director, Office of Regulations and Rulings, at Customs Headquarters, of the authority granted the Commissioner of Customs by Treasury Department Order No. 165, Revised (T.D. 53654), to make decisions in liquidated damages cases. The Customs Delegation Order further provides for the redelegation of this authority from the Director, Office of Regulations and Rulings, to appropriate division directors and branch chiefs within the Office of Regulations and Rulings.

Comment: The proposed amendment, if promulgated, would have a significant economic impact on a substantial number of small entities, i.e., brokers. The provisions of the Regulatory Flexibility Act are therefore applicable.

Response: The amendment does not change any current economic impact upon brokers. Also, late filing liabilities generally are not assessed against brokers. Rather, they are assessed against importers of record who are ultimately liable, as principals on the entry bond, for any claims for liquidated damages.

Comment: The late filing mitigation guidelines, like the 19 U.S.C. 1497 and 1592 mitigation guidelines, should be published as an appendix to the Customs Regulations.

Response: Because of the legal complexity of the 19 U.S.C. 1497 and 1592 mitigation guidelines, they have been published as appendices to the Customs Regulations. The late filing guidelines do not involve such complexity. As with other noncomplex guidelines, they are not included in the Customs Regulations, but are published in the Fines, Penalties, and Forfeitures Handbook, which is available to the public.

Upon consideration of the comments received, and further review of the matter, it has been determined advisable not to incorporate the late filing guidelines in the Customs Regulations, but to adopt the amendment as proposed.

Executive Order 12291

This amendment does not meet the criteria for a "major rule" as defined by section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ANALYSIS

The provisions of the Regulatory Flexibility Act, relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to this amendment because it will not have a significant economic impact on a substantial number of small entities.

Accordingly, it is certified under the provisions of § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this rule will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, Customs Headquarters. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 172

Customs duties and inspection, Imports, Administrative practice and procedure, Penalties.

AMENDMENT TO THE REGULATIONS

Part 172, Customs Regulations (19 CFR Part 172), is amended as set forth below.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: September 12, 1984.
EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1984 (49 FR 39048)]

PART 172—LIQUIDATED DAMAGES

Section 172.22(d) is revised to read as follows:

§ 172.22 Special cases acted on by district director of Customs.

* * * * * * *

(d) *Failure to file timely entry summary after release under entry or immediate delivery permit.* (1) If an entry summary for merchandise not subject to quota has not been timely filed after release under an entry or under a special permit for immediate delivery, the district director shall issue a demand for liquidated damages in accordance with section 142.15 or 142.27 of this chapter, and in accordance with guidelines published by the authority of the Commissioner of Customs. The demand shall be canceled in accordance with guidelines published by the authority of the Commissioner of Customs.

(2) If the district director is satisfied that the violation occurred solely because of a delay in the return by Customs to the importer or broker of documents necessary to file the entry summary, he may cancel such liquidated damages without payment.

(3) If collection of an amount greater than that established in accordance with this section appears warranted, the case shall be forwarded to the Commissioner of Customs for disposition.

(4) In the case of an entry summary which has not been filed, the district director may not grant relief from a demand for liquidated damages until the entry summary has been filed.

(R.S. 251, as amended, section 484, 46 Stat. 722, as amended, section 618, 46 Stat. 757, as amended, section 624, 46 Stat. 759 (19 U.S.C. 66, 1484, 1618, 1624))

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19 CFR Part 171

(T.D. 84-210)

Customs Regulations Amendment Regarding Petitions for Remission of Certain Conveyance Forfeitures

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document implements, on a permanent basis, an interim amendment to the Customs Regulations which provides for a 30-day time limit for submission of petitions for relief from interested parties in matters involving the seizure/forfeiture of conveyances in certain instances. Before the interim regulations were issued on March 12, 1984, parties were permitted a 60-day period to submit petitions, irrespective of the character of the alleged violation.

It was necessary to implement the change because of the dramatic increase in seizures of conveyances used to facilitate the illegal importation of drugs and firearms. This amendment is necessary in order to expand the effectiveness of Customs drug smuggling enforcement efforts and to provide for the expeditious disposition of seized conveyances.

EFFECTIVE DATE: October 3, 1984.

FOR FURTHER INFORMATION CONTACT: Harriett D. Blank, Office of Regulations and Rulings, Miscellaneous Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5746).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The National Narcotics Intelligence Consumers Committee has documented that the supply of illegal drugs to the U.S. market and the subsequent extent of drug abuse has reached monumental proportions. Illegal drugs generated an estimated $80 billion in retail sales in 1980, a 23 percent increase from 1979. The severity of the drug abuse problem, the preponderance of drug users and the major increases in the volume of illegal drug importations in the U.S. are indicated by the significant increase in drug-related deaths, medical care, arrests, and seizures. The Customs Service is playing an increasingly significant role in the Administration's war on drugs. In fact, Customs seizes more conveyances than any other Federal agency. The increased effectiveness of the enforcement efforts places a significant burden on Customs in that the seized conveyances must be stored and maintained, often for extended periods of time.

In order to address this growing problem, it was necessary to take immediate action. Therefore, the Customs Regulations were amended on an interim basis by the publication of T.D. 84-60 on March 12, 1984 (49 FR 9166), to provide an expedited petition process for cases involving certain conveyance seizures. Specifically, § 171.12, Customs Regulations (19 CFR 171.12), was amended to provide that petitions for relief from the seizures of conveyances involved in the illegal transportation of any amount of heroin, 5 pounds or more of cocaine, 10 pounds or more of hashish, 250 pounds or more of other controlled substances, or firearms in a quantity clearly in excess of personal use needs, must be filed within 30 days from the date of mailing of the notice of fine, penalty, or forfeiture.

ANALYSIS OF COMMENTS

Only 6 comments were received in response to the publication of the interim regulations. Five of these were from banks or companies in the business of financing conveyances.

All commenters urged restoration of the 60-day petition period, but provided no documentation to substantiate their contention that a 30-day period would prove to be a burden on them. Section 171.13, Customs Regulations (19 CFR 171.13), as amended by T.D. 84-92, published in the Federal Register on April 25, 1984 (49 FR 17754), specifies which evidence a lienholder must submit with a petition for relief, and provides examples. The type of evidence specified is the kind of information a lienholder most certainly must require at the time a loan is granted. Customs believes the required information can easily be forwarded to Customs within the 30-day period.

After consideration of the comments received and further review of this matter, it has been determined advisable and necessary to

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implement the interim regulations set forth in T.D. 84-60 as a final rule.

Inapplicability of Notice and Delayed Effective Date Provision

Because of the ongoing problems associated with the delayed disposition of conveyances seized in connection with the illegal importation of certain drugs and firearms, it was determined that, pursuant to 5 U.S.C. 553(b)(3)(b), notice and public procedure were inapplicable and unnecessary. Accordingly, this amendment was adopted on an interim basis effective March 12, 1984. Because it has been effective since that date, good cause exists for dispensing with a delayed effective date pursuant to 5 U.S.C. 553(d)(3).

E.O. 12291 and Regulatory Flexibility Act

Inasmuch as Customs does not believe that the amendment meets the criteria for a "major rule" within the meaning of § 1(b) of E.O. 12291, a regulatory impact analysis has not been prepared.

Pursuant to the provisions of § 5 of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is hereby certified that the regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Act. Accordingly, the amendment is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 171

Administrative practice and procedure, Law enforcement, Penalties, Seizures and forfeitures.

Amendments to the Regulations

Part 171, Customs Regulations (19 CFR Part 171), is amended as set forth below.

Part 171—Fines, Penalties, and Forfeitures

Section 171.12 is amended by (1) redesignating paragraph (c) as paragraph (d), (2) redesignating paragraph (d) as paragraph (e), (3) adding a new paragraph (c), and (4) revising paragraph (b) to read as follows:

§ 171.12 Filing of petition.

* * * * * * *

(b) *When filed.* Except as provided in paragraph (c) of this section, or unless additional time has been authorized as provided in § 162.32(a) of this chapter, petitions for relief shall be filed within 60 days from the date of mailing of the notice of fine, penalty or forfeiture incurred.

(c) *Petitions for remission of forfeitures of certain conveyances.* Petitions for remission of forfeiture of a conveyance seized in connection with the illegal importation of any amount of heroin, 5 pounds or more of cocaine, 10 pounds or more of hashish, 250 pounds or more of other controlled substances, or firearms in a quantity clearly in excess of personal use needs, shall be filed within 30 days from the date of mailing of the notice of fine, penalty, or forfeiture incurred.

* * * * * * *

(R.S. 251, as amended sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624))

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: September 12, 1984.
EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1984 (49 FR 39047)]

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19 CFR Part 10

(T.D. 84-211)

Refund of Duties on Imported Watches and Watch Movements

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document finalizes an interim Customs Regulations amendment to reflect a new incentive designed by the Congress to stimulate watch assembly activity in the U.S. insular possessions. The new incentive is in the form of a production incentive certificate entitling the holder (or another party to which it has transferred some or all of its entitlement) to secure the refund of duties paid to Customs on specified watches, watch movements (including solid state watches and watch movements), and watch parts entered into the U.S. during a 3-year period beginning 2 years before the issue date of the certificate of entitlement. This incentive is being administered jointly by the Departments of Commerce and Interior and by Customs.

EFFECTIVE DATE: November 2, 1984.

FOR FURTHER INFORMATION CONTACT: Betty L. Colburn, Duty Assessment Division, U.S. Customs Service, 1301 Constitution

Avenue NW., Washington, D.C. 20229 (202-566-5307); or Richard Seppa or Frank Creel, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230 (202-377-1660).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pub. L. 97-446, an Act "to reduce certain Customs duties, to suspend temporarily certain duties, to extend certain existing suspensions of duties, and for other purposes", was approved on January 12, 1983.

The Act provides a new incentive designed to stimulate watch assembly activity in the U.S. insular possessions (i.e., U.S. Virgin Islands, Guam, American Samoa). The new incentive is in the form of a production incentive certificate which can be used to secure the refund of duties paid on specified watches, watch movements, and watch parts entered during a 3-year period beginning 2 years before the issue date of the certificate. This certificate is to be issued to eligible producers by March 1 of each calendar year.

Because the legislation became effective on January 27, 1983, the interim Customs Regulations amendment was published as T.D. 84-16 in the Federal Register on January 12, 1984 (49 FR 1480), and became effective on that date. No comments were received in response to the interim amendment.

The incentive is administered jointly by the Departments of Commerce and Interior and by Customs. Copies of International Trade Administration, Form ITA-360, Certificate of Entitlement to Secure the Refund of Duties on Watches and Watch Movements, are issued by Commerce/Interior and kept by the insular producers on their premises or at another location approved in advance by the Departments.

To obtain a refund, Form ITA-361, A Request for Refund of Duties on Watches and Watch Movements, must be presented by the certificate holder (or, because the certificate entitlements are transferable, by another party legally entitled to a portion or all of the entitlement) to a Customs official at the port of entry where the articles were entered. The documentation accompanying the request form must include a copy of the import entry, providing proof that duty was paid on the watches and watch movements.

The Form ITA-360 certificate expires 1 year from its date of insuance. A refund request made by either the insular producer itself or by a transferee named by the insular producer on Form ITA-361 must be filed within this 1-year period. This expiration date applies equally to all refund requests, whether a single request for the entire amount specified in the Form ITA-360 certificate or multiple requests for partial amounts. Refund requests will be accepted until either the amount specified in the certificate is depleted or until the certificate expires.

A request for refund on Form ITA-361 must be filed at the port where the watch import entry was originally filed, then forwarded to the appropriate Customs regional office of that port for payment and disbursement of copies. Every effort will be made to expedite the processing of these refunds. A fee of 1 percent will be deducted by Customs from each refund request as reimbursement to salaries and expenses of those Customs personnel processing the request. This figure has been reduced from 5 percent because Customs administrative costs were not as high as originally anticipated.

This document finalizes the interim amendment to Part 10, Customs Regulations (19 CFR Part 10), which added a new § 10.181 to provide a procedure to secure the refund of duties on watches and watch movements for watch producers in the U.S. insular posssessions. The Department of Commerce drafted rules for the issuance and handling of certificates and the transfer of entitlements as contained in 15 CFR Part 303.

Other than reducing the fee deducted by Customs, the interim amendment is being adopted without change.

Executive Order 12291

Because the amendment does not meet the criteria for a "major rule" as defined by § 1(b) of E.O. 12291, the regulatory impact analysis prescribed by § 3 of the E.O. is not required.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act, relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to this amendment because it has not had a significant economic impact on a substantial number of small entities nor imposed, or otherwise caused, a significant increase in the reporting, recordkeeping, or other compliance burdens since January 27, 1983. Accordingly, it is certified under the provisions of § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This amendment is not subject to the Paperwork Reduction Act of 1980, Pub. L. 96-511. Forms ITA-360 and 361 do not require OMB approval numbers because there are fewer than 10 respondents using the forms.

Drafting Information

The principal author of this document was James S. Demb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However personnel from Commerce, Interior, and other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Customs duties and inspection, Imports.

AMENDMENT TO THE REGULATIONS

The interim amendment to Part 10, Customs Regulations (19 CFR Part 10), published as T.D. 84-16 in the Federal Register on January 12, 1984 (49 FR 1480), which added a new center heading and new § 10.181, is adopted as a final rule with the following change. In paragraph (f) of § 10.181, the figure "5" is removed and, in its place, the figure "1" inserted.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: September 12, 1984.
EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1984 (49 FR 39043)]

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19 CFR Parts 18, 123, and 144

(T.D. 84-212)

Customs Regulations Amendments Relating to the Transportation of Bonded Merchandise

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide more control over imported merchandise transported in-bond from the port of entry to the port of destination or port of exportation. It is also designed to prevent abuses of the lay order period and general order procedures.

In-bond tranportation refers to merchandise moved under contract (bond) guaranteeing delivery to Customs and payment of duties and taxes. With few exceptions, existing regulations do not set a time for receipt and delivery of in-bond merchandise by a forwarding carrier, or notification to Customs of the arrival of the merchandise at the port of destination or exportation. As a result, the security of the merchandise is jeopardized and there are abuses of the lay order period and the general order procedure.

These amendments establish time periods for the receipt, delivery, and notification to Customs of arrival of imported merchandise transported in-bond within the United States. They also provide that presentation to Customs of the in-bond document accompanying the merchandise will be acceptable as proof of delivery, and that the new in-bond control system will be applicable to truck

shipments of in-bond merchandise transiting the United States to Canada or Mexico.

EFFECTIVE DATE: November 2, 1984.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: J. Bradley Lund, Office of Inspection and Control (202–566–5354); Entry Aspects: Jerry Laderberg, Entry Procedures and Penalties Division (202–566–5765); Bond Aspects: William Lawlor, Carriers, Drawback and Bonds Division (202–566–5865); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Under sections 552 and 553, Tariff Act of 1930, as amended (19 U.S.C. 1552, 1553), any merchandise arriving at a port of entry in the United States, other than merchandise the importation of which is prohibited, may be entered without appraisement or payment of Customs duty for: (1) transportation in-bond to any other port of entry; or (2) transportation in-bond through the United States for exportation. Either transportation must be made under the rules and regulations prescribed by the Secretary of the Treasury, most of which are set forth in Part 18, Customs Regulations (19 CFR Part 18).

The Customs Regulations do not specifically provide for the time of receipt, delivery, or notification to Customs of arrival of merchandise transported in-bond, except for transit air cargo and merchandise being transported for exportation (sections 6.21 and 18.20, Customs Regulations (19 CFR 6.21, 18.20)). As a result, the security of the merchandise and compliance with Customs laws and regulations are jeopardized. Abuses of the lay order period and the general order procedures (whereby merchandise which is landed but not covered by a permit for its release is allowed to remain on the dock or unloading area for a period of 5 days before it is deposited in a public store or general order warehouse) have also resulted from Customs failure to provide specific time limits for the movement of imported in-bond merchandise through the United States.

After extensive study of this problem over several years, by notice published in the Federal Register on October 14, 1983 (48 FR 46812), amendments to Parts 18, 123, and 144, Customs Regulations, were proposed. That notice proposed the following:

(1) An amendment to section 18.2(a), Customs Regulations, to provide that within 5 working days after presentation of an entry for merchandise to be transported in-bond, the forwarding carrier would be required to take receipt of the merchandise provided the lay order period or any extension of that period had expired and no other entry had been filed. If the forwarding carrier failed to take receipt of the merchandise in the required period, the transporta-

tion entry would be canceled and the merchandise treated as unclaimed as of the date of original arrival.

(2) An amendment to section 18.2(c), Customs Regulations, to provide that, except for transit air cargo provided for in section 6.21, Customs Regulations, bonded merchandise destined to a final port in the United States, or for exportation from the United States, would be required to be delivered to Customs at the port of destination or exportation within 30 days, if transported by land, or within 60 days if transported on board a vessel in the U.S. coastwise trade, after the date of receipt by the forwarding carrier at the port of origin. Failure to comply with this time limit would constitute an irregular delivery and subject the initial bonded carrier to penalties under section 18.8, Customs Regulations.

(3) An amendment to sections 18.2(d) and 18.7(a), Customs Regulations, to require a carrier delivering bonded merchandise to surrender the in-bond manifest to the district director within 2 working days, after arrival of any portion of the in-bond shipment at the port of destination or delivery of the merchandise to the exporting carrier at the port of exportation. As noted above, failure to comply with this time limit would constitute an irregular delivery and subject the initial bonded carrier to applicable penalties under section 18.8, Customs Regulations.

(4) An amendment to section 18.8, Customs Regulations, to provide that an acceptable proof of proper delivery of bonded merchandise to Customs at the port of destination or exportation would be a properly receipted copy of the in-bond document (the appropriate Customs Form 7512 or 7520, or the carnet).

(5) An amendment to section 18.2(b), Customs Regulations, to provide that the in-bond document and Customs control card (Customs Form 7512–C, Transportation Entry and Manifest of Goods) be prepared by the carrier, shipper, or any of the parties named in section 18.11(b), Customs Regulations, wherever merchandise is being transported in-bond. The Customs in-bond document thus prepared may then be signed by the carrier or any of the parties named in section 18.11(b), Customs Regulations.

(6) An amendent to the Customs Regulations to delete the words "in duplicate" after the words "Customs Form 7512–C" whenever they appear in the Customs Regulations and to substitute the word "destination" for "duplicate" wherever that word appears in the Customs Regulations in reference to the second part of Customs Form 7512–C. Several other editorial changes and conforming amendments to Part 18, Customs Regulations, were also proposed. These amendments to the general provisions contained in sections 18.1–18.8 apply to merchandise in transit through the United States to foreign countries (sections 18.20–18.24, Customs Regulations), and merchandise withdrawn from warehouse for transportation or transportation and exportation (sections 144.36 and 144.37, Customs Regulations).

The proposed in-bond control system also was to apply to baggage in transit from port-to-port in Canada or Mexico through the United States (section 123.64, Customs Regulations), and truck shipments transiting the United States, except when otherwise provided. An additional paragraph to section 123.42, Customs Regulations, was proposed to accomplish this purpose.

Interested parties had until December 13, 1983, to submit written comments. Nine comments were received in response to the notice. A discussion of these comments and our responses follows.

Discussion of Comments

Most of the comments oppose at least some of the time limits placed upon the in-bond transportation of merchandise through the United States. The reason most often given for this opposition was the inability to adhere to the time limits because of circumstances beyond the carrier's control. These circumstances ranged from non-cooperation of the broker or other bonded carrier to acts of God, such as inclement weather.

Specific comments and our responses are as follows:

Comment: Movement of merchandise wholly or partially by barge may be impeded by ice or low water, thereby precluding delivery to the port of exportation or destination within the 30- or 60-day time limit. Also, the 30-day time limit is too short for certain rail traffic which may be restricted to movement during daylight hours.

Response: These conditions may be considered a circumstance beyond the carrier's control, upon which the district director, in his discretion, may mitigate any penalties or cancel the claim for liquidated damages incurred for late deliveries.

Comment: Allowing the forwarding carrier 5 days in which to take receipt of the merchandise being transported in-bond (after presentation of an entry for the merchandise and expiration of the lay order period and any extensions thereof) is unnecessary and could result in cargo sitting on the dock for long periods of time. This would continue the importing carrier's obligation under his bond.

Response: Although on occasion merchandise may remain on the dock for a long period, in most instances the importing carrier would not allow bonded merchandise it delivers to sit on the dock for an extended period. Customs believes that the exigencies of commerce require that the importing carrier be allowed an additional 5 days beyond the lay order period to arrange for the further transportation of the merchandise.

As to the continuation of the importing carrier's bond obligation while the merchandise is sitting on the dock, we note that the importing carrier has control over this situation. It could require the forwarding carrier to sign off on the in-bond transportation document (Customs Form 7512) which would extinguish its (the importing carrier's) bond obligation.

453-451 O - 84 - 5

Comment: An operator of a limited use short route pipeline extending from a seaport to a contiguous country border location complains that the special nature of its operation often results in the imported material remaining in its pipeline in the United States for over 30 days. Since this company cannot always complete a transit movement within 30 days of the in-bond entry, it suggests that an exclusionary provision be added to section 18.2(c)(2), Customs Regulations, for merchandise transported by pipeline.

Response: While we recognize that the above problem exists, especially with regard to imported oil which may sit in a shore tank for a long period of time before it is sent through the pipeline or remain in the pipeline for some time after initial entry, we do not believe this occurs enough to warrant an exclusion from the regulation. A district director may use his discretionary authority to grant extensions of time to the pipeline operator for the in-transit movement of the merchandise through the pipeline.

Comment: Because of some misunderstanding between the broker who files the in-bond entry and the carrier who picks up the merchandise, the carrier may fail to receipt for the merchandise.

Response: This is a private matter between the broker and the carrier. It does not involve Customs.

Comment: The requirement that the carrier surrender the manifest to Customs within 2 days of arrival of the shipment at the port of destination is unreasonable because Customs may not be able to respond to the carrier's request for examination for up to 5 days.

Response: The commenter is confusing the issue here. The carrier need only deliver the manifest to Customs within the 2-day period to relieve itself of liability for failure to deliver the manifest. It does not have to wait for physical examination by Customs of the cargo to present the manifest.

One commenter suggested that the carrier's receipt of a copy of the in-bond document (Customs Form 7512) presented to Customs would help in resolving liquidated damages claims. While we agree with this comment, we note that this would only provide proof that the carrier has satisfied his obligation to report the arrival of the merchandise. It would not relieve it of liability for shortages, misdelivery, etc., under section 18.8, Customs Regulations.

Another commenter noted that the proposal did not provide a separate paragraph for merchandise delivered from a warehouse, as in present section 18.2(a)(2). We have remedied this by redesignating existing section 18.2(a)(2) as section 18.2(a)(3).

After careful analysis of the comments received and further review of the matter, it has been determined to adopt the proposal with the modification to section 18.2(a), as stated above.

EXECUTIVE ORDER 12291

It has been determined that these amendments are not a "major rule" within the criteria provided in section 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 et seq.), it is hereby certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR

Part 18: Common carriers, Customs duties and inspection, exports, freight forwarders, imports, surety bonds.
Part 123: Canada, Mexico, motor carriers.
Part 144: Warehouses.

AMENDMENTS TO THE REGULATIONS

Parts 18, 123, and 144, Customs Regulations (19 CFR Parts 18, 123, 144), are amended as set forth below:

PART 18—TRANSPORTATION IN-BOND AND MERCHANDISE IN-TRANSIT

1. Paragraph (a), the first sentence of paragraph (b), and paragraphs (c) and (d) of section 18.2 are revised to read as follows:

18.2 Receipt by carrier, manifest.

(a)(1) *Merchandise other than from warehouse delivered to bonded carrier.* Except as set forth in paragraph (a)(2) of this section, within 5 working days after presentation of an entry for merchandise to be transported in-bond, the forwarding carrier shall take receipt of the merchandise if any lay order period and extension thereof have expired and no other entry is filed. If the forwarding carrier fails to take receipt of the merchandise within the prescribed period, the transportation entry shall be canceled and the merchandise shall be treated as unclaimed as of the date of original arrival.

(2) When merchandise is delivered to a bonded carrier for transportation in-bond, the merchandise shall be laden on the conveyance under supervision of a Customs officer unless—

(i) The transporting conveyance is not to be sealed with Customs seals, or

(ii) The lading inspector accepts the check of the carrier as to the merchandise laden. The carrier's receipt shall be given immediately to the lading inspector on the Customs in-bond document (the appropriate Customs Form 7512 or 7520, or the carnet) covering the merchandise. In the case of a carnet, the receipt shall be given on the appropriate vouchers in the following form:

Received the cargo listed herein for delivery to Customs at the indicated port of destination or exportation, or for direct exportation.

Name of Carrier (or Exporter) _____. Attorney-in-fact or Agent of Carrier (or Exporter) _____.

_____

_____

Date _____.

(3) *Merchandise delivered from warehouse.* When merchandise is delivered from a warehouse to a bonded carrier for transportation in bond, supervision of lading shall be accomplished in accordance with the procedure set forth in section 19.6(b) of this chapter.

(b) A Customs in-bond document, containing a description of the merchandise, and Customs control card (Customs Form 7512–C), shall be prepared by the carrier or any of the parties named in section 18.11(b), whenever merchandise is being transported in bond. The Customs in-bond document thus prepared shall then be signed by the carrier or any of the parties named in section 18.11(b). * * *

(c)(1) After the merchandise has been laden and the in-bond carrier or his agent has receipted the in-bond document, either Customs Form 7512 or 7520 (in duplicate), together with either the related Customs Form 7512–C (destination) or the carnet (which cannot be used in conjunction with Customs Form 7512–C) shall be delivered as a manifest to the conductor, master, or person in charge to accompany the merchandise to its port of destination or exportation. If more than one conveyance is used to transport the merchandise, the Customs Form 7512–C (destination) shall accompany the first conveyance, and two copies of Customs Form 7512 shall accompany each conveyance as a manifest of the merchandise transported by that conveyance. A TIR carnet (see section 18.3(b)) shall not be used if more than one conveyance is required.

(2) Except transit air cargo provided for in section 6.21 of this chapter, bonded merchandise destined to a final port of destination in the United States, or for export from the United States, shall be delivered to Customs at the port of destination or exportation within 30 days after the date of receipt by the forwarding carrier at the port of origin, if transported on land. If the merchandise is transported on board a vessel engaged in the United States coastwise trade, delivery to Customs at the port of destination or exportation shall be within 60 days after the date of receipt by the for-

warding carrier at the port of origin. Failure to deliver the merchandise within the prescribed period shall constitute an irregular delivery and the initial bonded carrier shall be subject to applicable penalties (see section 18.8).

(d) Promptly, but no more than 2 working days after the arrival of any portion of the in-bond shipment at the port of destination, the delivering carrier shall surrender the in-bond manifest (the in-bond document and related Customs Form 7512–C (destination) or the carnet) to the district director as notice of arrival of the merchandise. If the in-bond manifest is lost in transit, the in-bond carrier shall report the arrival of the merchandise within the prescribed period and shall be responsible for obtaining copies of the original in-bond manifest. Failure to surrender the in-bond manifest or report the arrival of bonded merchandise within the prescribed period shall constitute an irregular delivery and the initial bonded carrier shall be subject to applicable penalties (see section 18.8).

2. Section 18.3(b) is revised to read as follows:

18.3 Transshipment; [3] transfer by bonded cartmen.

* * * * * * *

(b) When bonded merchandise, other than merchandise covered by a TIR carnet, is to be transshipped to more than one conveyance, the carrier or any of the parties named in section 18.11(b), shall prepare for each such conveyance, two additional copies of the Customs Form 7512 which accompanied the merchandise to the place of transshipment. The Customs Form 7512 and Customs Form 7512–C (destination) which accompanied the shipment to the place of transshipment shall be presented to the district director there. The Customs officer supervising the transshipment shall execute a certificate of transfer on all copies of the Customs Form 7512. The original copies of the Customs Form 7512 and the related Customs Form 7512–C (destination) shall be delivered to the conductor, master, or person in charge of the first conveyance. Two additional copies of the Customs Form 7512 shall be delivered to the person in charge of each additional conveyance in which the merchandise is forwarded for delivery to the district director at the port of destination or exportation.

3. Section 18.7(a) is revised to read as follows:

18.7 Lading for exportation, verification of.

(a) Promptly, but no more than 2 working days, after arrival of any portion of the in-bond shipment at the port of exportation, the delivering carrier shall surrender the in-bond manifest (the in-bond document and related Customs Form 7512–C (destination) or the carnet) to the district director as notice of arrival of the merchandise. If the in-bond manifest is lost in transit, the in-bond carrier shall report the arrival of the merchandise within the prescribed period and shall be responsible for obtaining copies of the original

in-bond manifest. Failure to surrender the in-bond manifest or report the arrival of bonded merchandise within the prescribed period shall constitute an irregular delivery and the initial bonded carrier shall be subject to applicable penalties (see section 18.8).

4. Section 18.8(a) is revised to read as follows:

18.8 Liability for shortage, irregular delivery, or nondelivery; penalties.

(a) The initial bonded carrier shall be responsible for shortage, irregular delivery, or nondelivery at the port of destination or exportation of bonded merchandise received by it for carriage. An acceptable proof of proper delivery of bonded merchandise to Customs at the port of destination or exportation is a properly receipted copy of the in-bond document (the appropriate Customs Form 7512 or 7520, or the carnet). When sealing is waived, any loss found to exist at the port of destination or exportation shall be presumed to have occurred while the merchandise was in the possession of the carrier, unless conclusive evidence to the contrary is produced.

5. The last sentence of paragraph (b) of section 18.13 is revised to read as follows:

18.13 Procedure; manifest.

* * * * * * *

(b) * * * Two copies of Customs Form 7520 and the related Customs Form 7512–C (destination) shall be delivered to the carrier to accompany the baggage and shall be delivered by the carrier to the district director at the port of destination as a notice of arrival.

6. Section 18.20(c) is amended by removing the last sentence.

(R.S. 251, as amended (19 U.S.C. 66), sections 552, 553, 557, 623, 624, 46 Stat. 742, as amended, 744, as amended, 759, as amended (19 U.S.C. 1552, 1553, 1557, 1623, 1624))

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. Sections 123.42 (c)(1) and (d) are amended by removing the word "(duplicate)" and inserting, in its place, the word "(destination)".

2. Section 123.42 is further amended by adding a new paragraph (g) to read as follows:

123.42 Truck shipments transiting the United States.

* * * * * * *

(g) *Forwarding procedure.* Except as otherwise provided in this section, merchandise transported in trucks shall be forwarded in accordance with the general provisions for transportation in bond (sections 18.1–18.8 of this chapter).

3. Section 123.64(b) is amended by removing the word "(duplicate)" and inserting, in its place, the word "(destination)".

(R.S. 251, as amended (19 U.S.C. 66), sections 552, 553, 557, 623, 624, 46 Stat. 742, as amended, 744, as amended, 759, as amended (19 U.S.C. 1552, 1553, 1557, 1623, 1624))

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

Section 144.36(c) and section 144.37(a) are amended by removing the words, "in duplicate".

(R.S. 251, as amended (19 U.S.C. 66), sections 552, 553, 557, 623, 624, 46 Stat. 742, as amended, 744, as amended, 759, as amended (19 U.S.C. 1552, 1553, 1557, 1623, 1624))

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: September 12, 1984.

EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1984 (49 FR 39044)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 1, 1984.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 84-89)

This ruling holds that defective parts imported to be repaired and resold in the United States should be appraised under the superdeductive value method of appraisement, reasonably adjusted under section 402(f) of the Trade Agreements Act.

Date: December 20, 1983
File: CLA-2 CO:R:CV:VS
543123 CW

To: District Director of Customs, San Francisco, California 94126.
From: Director, Classification and Value Division (Headquarters).
Subject: Internal Advice Request No. 80/83; Valuation of Defective Merchandise.

This is in reference to your memorandum of June 21, 1983, received in this office on July 1, 1983, which forwarded the subject request initiated by the (company name).

Issue: If a value derived from the superdeductive value method under section 402(d)(2)(A)(iii) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA), reasonably adjusted pursuant to section 402(f) of the TAA, is the proper basis of appraisement for certain imported defective merchandise, what is the superdeductive value starting price from which should be deducted the amounts specified in section 402(d)(3)(A)?

Facts: (company name), the importer, manufactures and sells a wide variety of electronic equipment to customers in countries around the world where wholly-owned subsidiaries service the

equipment. As an example of the circumstances which gave rise to this request, if a customer in Australia has a malfunctioning piece of equipment, a service engineer from the Australian subsidiary will travel to the customer's premises and repair the equipment by replacing the cause of the problem, usually a printed circuit board, with a functioning part. The customer has a choice of having the defective board replaced with a new board or a "functionally identical repaired" board. The price paid by the customer for a new board is referred to as the "factory base price" while the significantly lower price for a refurbished board is referred to as the "net exchange price." The process of replacing a defective part with a refurbished part is known as the "Exchange Program."

When the Australian subsidiary accumulates a certain quantity of defective parts, they are sent to one of the importer's refurbishment facilities in the United States and at the same time an equal number of equivalent repaired parts are ordered from the United States importer. The importer pays nothing for the defective parts and, in fact, both the Australian subsidiary's accounting records and the records of the refurbishment facility list the defective parts as having zero value. Each refurbished part ordered by the Australian subsidiary to replenish its inventory of such parts is sold to the subsidiary by the United States importer at the net exchange price less the inter-company discount.

Approximately 20 of every 100 defective parts shipped to the United States to be repaired are found to be unrepairable and are scrapped. Another 20 of every 100 defective parts are found to be in good working order, although these as well as the remaining 60 defective parts will be enhanced so that they meet the importer's current specifications. The parts which are repaired and enhanced are then sold by the refurbishment facility to the importer's service organizations in the United States and in countries around the world at the net exchange price less the inter-company discount.

The same sequence of events as related above regarding the Australian customer take place when customers in the United States experience problems with their electronic equipment. A United States customer who has a defective part replaced with a refurbished part pays the same price as the Australian customer—the net exchange price. It is important to note here that customers in the United States and elsewhere who have defective parts replaced are required to relinquish the defective part to the service organization. If for some reason a customer cannot return a defective part to the service organization, the customer is assessed a penalty equal to the difference between the net exchange price and the factory base price. This penalty amount is in addition to the amount which the customer must pay for the replacement part (the net exchange price). Thus, under circumstances in which a customer does not return a defective part, the total amount which he must pay,

including the penalty, equals the factory base price for a functionally equivalent new part.

Both your office and the importer agree that for purposes of appraising the defective parts when they are sent to the United States for refurbishing, none of the four bases of appraisement set forth in section 402 (b) through (e) of the TAA can be satisfactorily established. Transaction value under section 402(b) is eliminated because nothing is paid for the defective parts by the importer's United States refurbishing facility, although the importer admits that the parts have a value when they arrive in the United States. Section 402(c) also is precluded since there are no sales of identical or similar merchandise for exportation to the United States. Deductive value under section 402(d) cannot be found because the importer is unable to determine whether an individual imported part is sold in the United States within the time limits prescribed by section 402(d). Finally, computed value under section 402(e) is eliminated for the reason that neither the imported merchandise nor merchandise of the same class or kind is produced or sold in the country of exportation for export to the United States.

Your office and the importer further agree that the defective parts should properly be appraised under the "superdeductive value" method of appraisement, section 402(d)(2)(A)(iii), "reasonably adjusted" to the extent necessary pursuant to section 402(f). The sole point of disagreement between the importer and your office concerns the price from which the deductions specified in section 402(d)(3)(A) should be made. In your view, the superdeductive value starting price should equal the total amount charged a customer for a refurbished part when the customer fails to return the defective part. The total amount charged under those circumstances would be the net exchange price plus the penalty, which is the difference between the net exchange price and the factory base price of a functionally equivalent new part.

The importer contends that the appropriate starting price should be the net exchange price inasmuch as that is the United States selling price of a refurbished part. According to the importer, it is incorrect to use the price of a new part as the basis for determining superdeductive value because the new part "has neither been imported nor further processed" and because the price of one commercial item cannot be used as the starting point for establishing the value of another commercial item. The importer further states that the number of instances in which a customer is penalized the difference between the net exchange price and the factory base price for failing to return a defective board is "truly limited." Under these circumstances the importer claims that:

> Such transactions cannot be considered for purposes of appraisement under deductive value. The isolated instances in which this occurs do not meet the statutory requirement that such sales must be at "a total volume that is (i) greater than

the total volume sold at *any other unit price* * * *." (Emphasis added)

Law and analysis: We agree with your office and the importer that the affected merchandise should be appraised pursuant to section 402(f) of the TAA, on the basis of a value that is derived from the superdeductive value method set forth in section 402(d)(2)(A)(iii) of the TAA. To arrive at such a value, it is necessary to "reasonably adjust" this method by eliminating the time requirements within which individual imported parts must be resold in the United States.

In determining superdeductive value, section 402(d)(2)(A)(iii) provides, in relevant part, that:

> If the merchandise concerned was not sold in the condition as imported and not sold before the close of the 90th day after the date of importation of the merchandise being appraised, the price is the unit price at which the merchandise being appraised, after further processing, is sold in the greatest aggregate quantity before the 180th day after the date of such importation.

Pursuant to section 402(d)(3)(A), that "price" is then reduced by amounts equal to the five items specified in subsections (i) through (v) to arrive at a final appraised value for the imported articles. One of the deductions, of course, consists of the "* * * value added by the processing of the merchandise after importation * * *."

For purposes of ascertaining the "unit price" at which an imported article is sold in the United States after having been further processed in this country, we believe that it is necessary to look to the total consideration received by the seller from the buyer for that article. In this case, the total consideration which is received from a customer by the importer's service organization on the sale of a refurbished part consists of the net exchange price plus the return of the replaced defective part. Consequently, it is our opinion that the "price" of a refurbished part should equal the net exchange price plus the value of the defective part.

While the net exchange price for each refurbished part involved in the exchange program is known, no attempt has been made by the importer to establish the value of the defective parts which are replaced in the United States. Ascertaining a value for the defective parts is made more difficult by the fact that refurbished parts apparently are never sold to customers except pursuant to the exchange program. In other words, a refurbished part is never sold at a price which is not conditioned on the return of a defective part. The amount which is assessed as a penalty when a customer is unable, for whatever reason, to return a defective part, is the only information in our possession relating to the value of defective parts.

The importer advises that the only reason a substantial penalty is assessed when a customer fails to return a defective part is to discourage customers from retaining such parts. Thus, it may be argued that the penalty serves merely as a deterrent and not as a means of obtaining reimbursement for a defective part which is not returned.

Our response to this argument is that, in our opinion, the penalty amount undoubtedly includes some reimbursement to the importer's service organization for the loss of a defective part. Since the importer has made no attempt to establish what portion of the penalty amount reflects the proper value of the defective part, we have no alternative but to derive a value for the defective part based upon the full penalty amount.

Concerning the importer's contention that Customs should not be focusing on the "truly limited" number of instances in which a customer is penalized for failing to return a defective board, our position, again, is that we have no alternative but to focus on the penalty amount since it constitutes the only evidence in the record of the value of the defective parts.

Holding: Defective parts imported under the circumstances of this case should be appraised on the basis of a value that is derived from the superdeductive value method of appraisement, reasonably adjusted, pursuant to section 402(f) of the TAA, in the manner specified in this decision. The superdeductive value starting price from which shall be deducted the amounts set forth in section 402(d)(3)(A) equals the net exchange price of the imported part plus the difference between the net exchange price and the factory base price of a functionally equivalent net part.

(C.S.D. 84-90)

This ruling holds that the Commissioner of Customs is authorized to issue a crusing license to a pleasure boat of a foreign country which would exempt such vessel from obtaining permits to proceed, from making entry at United States ports (except the first U.S. port of arrival from foreign), and from the payment of fees if it is established that the foreign country grants the same exemptions to American pleasure boats (46 U.S.C. 104).

Date: April 18, 1984
File: VES-4-02-CO:R:CD:C
106748 DHR

The Honorable ROBERT E. BADHAM,
House of Representatives,
Washington, DC.

DEAR MR. BADHAM: Your letter of March 16, 1984, to the Department of Commerce concerning the activities of foreign yachts in U.S. waters has been forwarded to us for reply, as this matter involves the navigation laws administered by the Customs Service.

Your letter enclosed a copy of a letter from (a constituent) which in turn forwarded copies of pages from *SEA* magazine, which pubished a letter from Paul Benoidt, a Belgian national

Mr. Benoidt, who sailed his vessel on the Intracoastal Waterway from Florida to Maryland, wrote that he was informed his voyage would take his boat through 5 different Customs districts and he would be required to "clear in and out each time" at a cost of $14.50 per each of 10 clearances. This was both expensive and inconvenient. He states that in Western European countries a visting foreign yacht needs to clear only upon its first arrival in the country.

Pursuant to the Act of February 18, 1793 (46 U.S.C. 313–315) the matter of every foreign vessel bound from one Customs district in the United States to any other such district is required to obtain a permit to proceed to the next succeeding district at which the vessel is intended to call. Section 433, Tariff Act of 1930 (19 U.S.C. 1433), requires, in pertinent part, that the master of a foreign vessel report at the nearest customhouse within 24 hours of the vessel's arrival from a foreign or from another domestic port.

The navigation laws make no distinction between merchant vessels and pleasure vessels. It is therefore incumbent upon the Customs Service to apply them to foreign pleasure vessels. Accordingly, a foreign pleasure vessel which proceeds from one port or place in the United States to another such port or place is required to obtain at the nearest customhouse a permit to proceed to the next port or place at which the vessel intends to stop. A permit to proceed to a particular port or place is not required if the vessel does not intend to put in there but will merely traverse the waters of such port while proceeding to another place where it does intend to stop for which it *will* need a permit to proceed.

Pursuant to the provisions of section 435 of the Tariff Act (19 U.S.C. 1435) a foreign vessel is required to make entry at the customhouse within 48 hours after arrival within the limits of a Customs collection district (filing a manifest of goods acquired abroad, ship's papers, etc).

Section 214 of the customs Procedural and Simplification Act of 1978 (19 U.S.C. 58a) authorizes the Secretary of the Treasury to establish a schedule of fees to be charged and collected for furnishing the above-mentioned services. These fees are to be consistent with section 501 of the Independent Offices Appropriation Act, 1952 (31 U.S.C. 9701), the so-called user charges statute, which provides that the cost of specific services for private interests shall be reimbursed to the Government.

However, the Act of May 28, 1908 (46 U.S.C. 104) authorizes the Commissioner of Customs to issue a cruising license to a pleasure boat of a foreign country which would exempt such vessel from the necessity of obtaining permits to proceed to and of making entry at United States ports (except from making entry at the first United

States port of arrival from foreign), including an exemption from the payment of fees, whenever it has been established that the foreign country grants the same exemptions to American pleasure boats. (The report prescribed by 19 U.S.C. 1433 is still required.) Accordingly, if, for instance, the Customs Service is formally advised that Belgium exempts American pleasure boats cruising in Belgian waters from the above-described requirements, we would be happy to add Belgium to the list of countries whose pleasure boats are entitled to the exemption.

At present the Customs Service will issue cruising licenses to yachts of the 13 foreign countries listed in section 4.94(b), Customs Regulations (19 CFR 4.94(b)), i.e., Argentina, Australia, Bahama Islands, Bermuda, Canada, Germany, Great Britain (including certain islands identified in section 4.94 (b)), Greece, Honduras, Jamaica, Liberia, Netherlands, and New Zealand. This is done on the basis of reciprocal agreements with those countries that were concluded under the Act of May 28, 1908. While in the past and at our request the State Department has advised appropriate authorities of foreign countries, including Belgium, of our willingness to establish such reciprocal agreements, we have requested the State Department to again so advise the authorities of foreign countries, including Belgium.

(C.S.D. 84-91)

This ruling holds the components which are destroyed, scrapped, lost or rejected and not physically incorporated into the imported article are not assists under the Trade Agreement Act of 1979 (TAA).

Date: April 30, 1984
File: CLA-2 CO:R:CV:V
543093 MK

To: Deputy Regional Commissioner, Regulatory Audit, Pacific Region.

From: Director, Classification and Value Division.

Subject: Dutiable Status of Yield Loss Under the Trade Agreements Act of 1979; I.A. 109/83.

This refers to your memorandums of May 23, 1983, and February 29, 1984, and a submission from the attorney for (Name) (the importer) requesting Internal Advice concerning the treatment of yield loss under the following facts.

The importer consigns integrated circuits and similar components free of charge to Far East assemblers of video computer systems and related articles. The importer purchases the components from foreign or U.S. unrelated companies.

The components are tested and inspected prior to use in production, and some are rejected because they do not conform to the importer's quality specifications. The importer also found some inven-

tory shrinkage in a 1981 inventory of consigned materials held by the assemblers.

The issue is whether these rejected or scrapped components and the inventory loss can be considered as assists under the Trade Agreements Act of 1979 (TAA). Assists are an addition to the price paid or payable under transaction value, under section 402(b)(1)(c) and are an element of computed value under section 402(1)(C).

Section 402(h)(1)(A) defines assists as follows:

> (1)(A) The term "assists" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:
>
> (i) Materials, components, parts, and similar items incorporated in the imported merchandise.
>
> (ii) Tools, dies, molds, and similar items used in the production of the imported merchandise.
>
> (iii) Merchandise consumed in the production of the imported merchandise.
>
> (iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

The importer's attorney argues that the common meaning of the term "incorporated" as used in section 402(h)(1)(A)(i) *means* the materials, components or parts which are *actually, physically* incorporated into the imported merchandise. Components which are rejected during the production process and which do not actually become physically incorporated into the imported article do not come within the statutory definition of assists.

In further support of his position he cites several Headquarters rulings (including TAA Nos. 2, 4, and 11) which held that only those items coming within the statutory definition of assists can be added to the price paid or payable under transaction value.

You contend that the costs of yield loss and inventory loss should be part of the value of the components incorporated into the imported articles. You point out that, based on yield experience, the importer provides the assemblers with 103–105 percent of the components needed to produce the imported merchandise. The extra 3–5 percent provides a safety allowance for components rejected prior to, or damaged during assembly. You cite Legal Determination 3664–01, dated May 20, 1976, which in part held that where the yield loss of a specific type of U.S. component can be determined with reasonable accuracy, the cost of that component assembled into an imported article should include the cost of yielded components applicable to that article.

You also cite TAA No. 53, which stated that the TAA made no changes to the provisions of law cited in the ruling, relating to

item 807.00, TSUS, and you refer to generally accepted accounting principles relating to standard material costs. Such costs, which are the product of two separate factors—quantity and price, should include allowances for scrap and other losses as is stated in an accounting handbook, parts of which you quote.

The key to the whole issue, in your opinion, is the fact that extra or yielded quantities of components (more than 100 percent) are needed in manufacturing to cover unavoidable losses. You believe the value of an assist for components incorporated into imported products is equal to the acquisition costs times the yielded quantities, plus transportation costs to the place of production.

Prior to the effective date of the TAA, section 402 of the tariff act did not define the term "assists." Court decisions and Headquarters rulings considered assists to be anything of value which was acquired by or furnished to a foreign manufacturer, producer, or assembler at less than full cost or value, which was used to produce the imported article. Also, prior to the TAA, most assembled merchandise was appraised under constructed value (or cost of production) because export value was generally found to be inapplicable to assembled merchandise (See section 10.18(b), Customs Regulations).

As stated in *Ford Motor Company* v. *United States,* A.R.D. 9 (1952), the purpose of the constructed value statute was ". . . to derive not the manufacturer's actual cost, but the actual cost of manufacture." Similarly, the case of *Goodrich Gulf Chemicals, Inc.* v. *United States,* R.D. 11733 (1971), stated that "The constructed value and cost of production formulas are designed, under their respective statutes, to embrace all expenses of manufacture or fabrication of an article, whether borne by the manufacturer or the purchaser."

Under the rationale of these and many similar decisions, and the broad statutory language which provided that cost of production and constructed value included the cost of materials *employed in producing* such or similar merchandise, we included the cost or value of scrapped components as part of the cost of materials.

The TAA defines assists and excludes from that definition certain things which were formerly treated as assists. Also, under TAA No. 2, we contemplated the use of transaction value (the counterpart of export value) as the primary basis of appraisement for merchandise eligible for item 807.00 treatment. The Statement of Administrative Action, which has the force and effect of law, anticipated that computed value (the counterpart of cost of production and constructed value) ". . . will generally be limited to those cases where the buyer and seller are related and the producer is prepared to supply to United States authority the necessary cost information and to provide facilities for any subsequent verification which may be necessary."

From this discussion, it becomes apparent that many court decisions and Headquarters rulings which were valid prior to the TAA cannot be regarded as precedents under the TAA. The Legal Determination you cite is a case in point. TAA No. 53 concerned the dutiable status of freight costs of U.S. components supplied free of charge to foreign assemblers. The ruling cited item 807.00, the TSUS headnote cited therein, and section 10.17, Customs Regulations, all of which, we said, were unchanged by the TAA. That ruling is not relevant to this decision because the cited provisions do not deal with the valuation of assembled articles. This is covered in sections 10.18 and 10.19 of the regulations which for the most part, reflect pre-TAA law.

Finally, even though the importer's accounting records for its consigned components reflect yielded costs, which practice conforms to generally accepted accounting principles, that fact would not be determinative of the issue in this case.

While the TAA emphasis on generally accepted accounting principles is an integral part of the law, those principles are not a separate basis of appraisement. The law requires us to accept information in the form submitted when it is submitted in accordance with generally accepted accounting principles, but we do not have to appraise merchandise on the basis of that information simply because it conforms to generally accepted accounting principles. Thus, the importer's accounting methods cannot serve to broaden the statutory definition of assists.

Since Congress, in enacting the TAA, defined assists and excluded from that definition certain items and services which were, under court decisions and Headquarters rulings, formerly considered to be assists, Headquarters has followed the Congressional intent to narrow the assist concept and has held that if an item is not included in the definition it is not an assist. See, for example, TAA Nos. 2, 4, 11, and 20.

In conformity with our policy to adhere to the statutory definition, we conclude, in agreement with the importer's attorney, that components which are destroyed, scrapped, or lost, and which are not physically incorporated into the imported article are not assists under the TAA.

Please send the importer's attorney a copy of this decision.

(C.S.D. 84-92)

This ruling holds that a valuation method other than the transaction value of identical or similar merchandise must be used in a consignment by an exporter to itself in the United States, due to the lack of sufficient information to make the necessary adjustment for differences in level of trade (19 U.S.C. 1401(a)(c)(2)).

453-451 O - 84 - 7

Date: May 10, 1984
File: CLA-2 CO:R:CV:V
543112 BNS

In your correspondence dated June 16, 1983, you requested a ruling on the valuation of coated and round steel wire manufactured by (company name) (exporter/importer), and which is to be imported into the United States by the same firm. You indicate that the exporter/importer currently sells its product to a number of non-related United States purchasers on a C.I.F., duty paid, delivered basis. You also state that the above transactions have been made on an arms-length basis; and that the commercial invoices have provided full details of the claimed non-dutiable charges of insurance, ocean freight, United States inland freight, duty, and brokerage fees.

You indicate that to better serve its customers, the exporter/importer now wishes to establish open warehouses in the United States from which some purchase orders would be filled. The transactions bringing merchandise into the United States warehouses would not involve a sale. However, the values to be shown on the invoices would be the C.I.F., duty paid, delivered prices which would apply, had there been an actual sale. Likewise, when an order is filled from stock out of the United States warehouses, the sale price will be the C.I.F., duty paid, delivered price for the quantity being sold, the freight from the warehouse to the customer, and an inventory carrying cost.

You indicate your belief that transaction value does not apply to the importations bringing the wire into the open warehouses because they do not involve sales. However, you seek confirmation from us that the wire could be appraised under 19 U.S.C. 1401a(c), (Transaction Value of Identical Merchandise and Similar Merchandise) inasmuch as identical merchandise had previously been sold in arms-length transactions and imported by non-related parties.

Although not explicity stated in the law, it is our opinion that 19 U.S.C. 1401a(c) cannot apply to merchandise which has been consigned by the exporter to itself in the United States, which apparently is the contemplated situation. In this regard, 19 U.S.C. 1401(a)(c)(2) provides in pertinent part:

> Transaction values determined under this subsection shall be based on sales of identical merchandise or similar merchandise as the case may be, at the same commercial level and in substantially the same quantity as the *sales* of the merchandise being appraised. If no such sale is found, sales of identical merchandise or similar merchandise at either a different commercial level or in different quantities, or both, shall be used, but adjusted to take account of any difference. Any adjustment made under this paragraph shall be based on sufficient information (emphasis added).

We note first that the underlined portion of the above provision has reference to merchandise undergoing appraisement that has been sold rather than consigned. In addition, even if the specific language of the provision were not a problem, there would still remain the practical impossibility of adjusting prior sales of identical or similar merchandise at *any* commercial level to the merchandise undergoing appraisement, inasmuch as the proper level for the merchandise undergoing appraisement could not be known without a sale of that merchandise. Accordingly, in the situation described above, sufficient information to make the required adjustment is not available, and a valuation method other than the transaction value of identical or similar merchandise must be used (*i.e.,* deductive value, computed value or a value that is derived from the methods previously considered).

(C.S.D. 84-93)

This ruling holds that blended syrup consisting of refined sugar (cane or beet) and corn syrup whose relative proportions will be 50 to 65 percent refined cane or beet sugar (sucrose) and 35 to 50 percent corn syrup (glucose) is classifiable in item 155.75, TSUS. The absolute quota restraint provision set forth in item 958.15, TSUS, does not apply to this product, however, the product would be subject to absolute quota restraint pursuant to item 958.10, TSUS.

Date: May 14, 1984
File: CLA-2 CO:R:CV:V
553022 LCS

This is in reply to your letter on behalf of (Company's Name) which you request information concerning the tariff status of a certain blended syrup consisting of refined cane or beet sugar and liquid corn syrup to be imported into the United States from a U.S. Foreign Trade Zone (FTZ) where the proposed blending operation will occur.

You state that refined cane or beet sugar will be entered into the U.S. FTZ from an unspecified foreign country (but not Cuba), where it will be blended with liquid corn syrup of U.S. origin. The relative proportions will be, on a dry weight basis, from 50 to 65 percent refined cane or beet sugar (sucrose) and 35 to 50 percent corn syrup (glucose).

You request Headquarters' confirmation that: (1) the product entered into the Customs territory of the United States from the FTZ is properly classifiable under the provision for syrup, flavored or unflavored, consisting of blends of any of the products described in Schedule 1, Part 10, Subpart A, Tariff Schedules of the United States (TSUS), in item 155.75, TSUS, dutiable at the column 1 rate of duty of 9.4 percent ad valorem, and an eligible article pursuant to the Generalized System of Preferences (GSP); and (2) the absolute quota restraint provision set forth in item 958.15, TSUS, does

not apply to this product, since it contains 65 percent or less of cane or beet sugars.

The blended syrup proposed to be imported into the customs territory of the United States from the FTZ would, indeed, be classifiable under the provision noted in your inquiry (*i.e.*, item 155.75, TSUS), and exempt from the absolute quota restraint set forth in item 958.15, TSUS, for the reason stated.

However, the product would be subject to absolute quota restraint pursuant to item 958.10, TSUS, and, therefore, prohibited from entry, unless prepared for marketing to the retail consumer in the identical form and package in which imported.

The Customs Service has ruled, with the concurrence of the Foreign Agriculture Service of the U.S. Department of Agriculture, that this limited exclusion from the absolute quota restraint level, established by the cited item number, is an "actual use" proviso (CLA-2-CO:R:CV:G, 073002/073277 LCS, October 28, 1983; CLA-2-CO:R:CV:G; 072725/072480/069077 LCS, November 28, 1983). This means that Customs will require the importer to comply with the provisions set forth in paragraphs 10.131 through 10.139, Customs Regulations (19 CFR 10.131-10.139), where the importer claims exemption from the quota provisions based on retail packaging, and may follow the goods into the stream of domestic commerce to insure that the packaging is not a subtrafuge or artifice to circumvent the otherwise applicable quota restraint levels.

(C.S.D. 84-94)

This ruling holds that a district director of Customs may temporarily suspend part of a bonded warehouse pursuant to 19 CFR. 19.3(b). The bonded and nonbonded areas shall be effectively separated by partition construction as described in 19 CFR 19.1(c) if not already separated by permanent partitions of substantial material and construction.

Date: May 16, 1984
File: WAR-1-CO:R:CD:D
216632 L

Issues: 1. Do the Customs Regulations allow a district director to grant termporary suspension of the use of bonded floor space within a bonded warehouse without requiring that such suspended space be separated from the remaining bonded space by substantial partitions meeting the standards of 19 CFR 19.1(c)?

2. Do the provisions of 19 CFR 19.1(c) providing for substantial partitions between bonded and non-bonded sections when "parts of buildings are used as Customs bonded warehouses," apply to the temporary suspension of floor space within a bonded warehouse under 19.3(b)?

3. Does the word "area" in 19.3(b) refer to the entire bonded warehouse, or only to that portion of the bonded warehouse for which a suspension is sought?

Facts: A warehouse of 109,000 square feet contains a Class 3 Customs bonded warehouse of approximately 45,000 square feet. The bonded section of the warehouse is separated from the non-bonded section by a solid wall running across the building, with two steel-clad entry doors providing access between the bonded and non-bonded sections.

The warehouse proprietor desires to temporarily suspend, pursuant to 19 CFR 19.3(b), approximately 12,000 square feet of the bonded section of the warehouse. The temporarily suspended section would not be physically separated in any manner from the bonded section; however, the proprietor states that because of the configuration of the building, no persons would have access to the temporarily suspended section who would not otherwise first have access to the bonded section.

Law and analysis: Customs bonded storage warehouses are established under the authority of 19 U.S.C. 1555. That section provides in part that:

> Buildings or parts of buildings and other enclosures may be designated * * * as bonded warehouses *for the storage of imported merchandise entered for warehousing* * * * and that:
>
> Except as otherwise provided in this chapter, bonded warehouses *shall be used solely for the storage of imported merchandise* * * *.
>
> Section 1557(a), 19 U.S.C., provides in part that:
>
> Any merchandise *subject to duty* * * * may be entered for warehousing and deposited in a bonded warehouse * * * (emphasis added).

Section 1556, 19 U.S.C., authorizes the Secretary of the Treasury to establish rules and regulations for bonded warehouses.

Parts 19 and 144 of the Customs Regulations (19 CFR Parts 19 and 144) are the Customs regulations generally relating to bonded warehouses.

Part 19.3(b) provides that all or part of a bonded warehouse may be temporarily suspended provided the suspension period does not exceed 1 year and there are no bonded goods in the area.

Part 19.1(c), relating to construction, provides that when parts of buildings are used as Customs bonded warehouses, the bonded and non-bonded portions thereof shall be effectively separated by partitions of substantial materials and construction.

With respect to the first issue, 19 CFR 19.1(c) clearly requires bonded and non-bonded portions of Customs bonded warehouses to be separated when parts of the buildings are used for storage of bonded merchandise. Obviously, if the second and third floors of a building, separated by a reinforced concrete floor, were used as a Customs bonded warehouse, and it was desired to suspend tempo-

rarily the third floor, we would not require removal of the floor and replacement by one of the methods of construction described in section 19.3(c), all other things being equal, although entrances would have to be properly secured.

The statute, 19 U.S.C. 1555, requires that a bonded warehouse be used solely for the storage of imported merchandise. The Customs Regulations, section 19.3(b), permit temporary suspension of a portion of the bonded space under certain conditions. When only parts of the building are bonded, section 19.1(c) requires the bonded and non-bonded portions to be effectively separated. With an exception noted in the enclosed March 12, 1957, circular letter (Bureau of Customs Circular Letter Number x–154, Customs Bonded Cold-storage Warehouses), the means of accomplishing that separation are set out in section 19.1(c). In general, then, the Customs Regulations do not allow a district director to temporarily suspend a portion of a bonded warehouse without requiring effective separation of the bonded and non-bonded portions.

In view of this, the provisions of section 19.1(c) do apply when parts of a bonded warehouse are temporarily suspended, assuming that the suspended portion is not already effectively separated by a permanent, substantial partition, as when it is desired to suspend one room or floor of a bonded warehouse or two rooms or two floors in a building of reinforced concrete construction, the interior walls and floors of which are also of reinforced concrete or other substantial construction.

The word "area" in section 19.3(b) refers to the suspended portion of the warehouse. All bonded goods must be removed from the portion of the warehouse that is to be temporarily suspended.

Holding: 1. The district director may temporarily suspend part of a bonded warehouse pursuant to 19 CFR 19.3(b). If the part of the bonded warehouse to be temporarily suspended is not separated from the part to remain bonded by permanent partitions of substantial materials and construction, the partition construction described in 19 CFR 19.1(c) may be utilized to separate the bonded and non-bonded parts.

2. Yes. The provisions of 19 CFR 19.1(c) apply to the temporary suspension of floor space within a bonded warehouse under 19.3(b).

3. The word "area" in 19 CFR 19.3(b) refers to the area to be suspended.

(C.S.D. 84–95)

This ruling holds that a drawback claimant under same condition drawback need not be the exporter of record for merchandise designated for drawback in order to be certified by the Regional Commissioner to operate under the exporters' summary procedure (sections 22.7(d), and 191.53, Customs Regulations, T.D. 72–310 dated October 31, 1972).

Date: May 16, 1984
File: DRA-1-09-CO:R:CD:D
216924 B

Issue: Must a drawback claimant under same condition drawback be the exporter of record for merchandise designated for drawback in order to be certified by the Regional Commissioner to operate under the exporters' summary procedure?

Facts: None presented.

Law and Analysis: Section 191.53 of the Customs Regulations, covering exporters' summary procedure, refers to "The exporter-claimant" throughout. This term might lead both Customs and the drawback public to believe that the privilege of using this method for proof of exportation for drawback purposes was limited to claimants who are exporters of record. Such was never the intent.

The exporters' summary procedure may be used by persons claiming under the various manufacturing drawback provisions and the same condition drawback provision. The procedure was included in the regulations orginally as section 22.7(d), Customs Regulations, by virtue of T.D. 72-310 of October 31, 1972.

Prior to the same condition drawback law, exporters' summary procedure was never limited to those manufacturing claimants who were exporters of record, although section 22.7(d)(1) specifically refers to "exporter-claimant." The administrative intent of the regulation was carried over into the regulations themselves. The procedure was promulgated to consolidate drawback claims by allowing claimants to file a periodic basis, thus substantially reducing paperwork. In addition to other criteria which the requester for summary procedure had to, and still must, meet, the claimant had to show sufficient export volume to justify usage of the procedure (see section 22.7(d)(2)(i) of the former drawback regulations). The "export volume" phrase was never interpreted as requiring the claimant to be the actual exporter of many shipments. It was interpreted that the claimant has to show sufficient exports covering merchandise to be designated by him as the basis of drawback.

The primary purpose of T.D. 72-310 of adding the uncertified notice and exporters' summary procedures to the methods of proving exportation for drawback was to liberalize the drawback procedure. Restricting use of the exporters' summary procedure to those claimants who are the exporters of record is not in accord with the administrative intent underlying the initiation of that procedure.

Holding: As is the case with manufacturing drawback, claimants requesting use of the exporters' summary procedure for claiming drawback need not be the exporters of record for the merchandise designated for drawback under same condition.

(C.S.D. 84-96)

This ruling holds that C.S.D. 81-95 is modified to the extent that marker buoys attached to the Outer Continental Shelf to mark drilling sites will no longer be considered coastwise points within the meaning of the Outer Continental Shelf Lands Act (43 U.S.C. 1333(a)(1)).

Date: June 4, 1984
File: VES-3-15 CO:R:CD:C
106670 DHR

C.S.D. 81-95 holds that marker buoys attached to and well production casings inbedded in the seabed of the Outer Continental Shelf (OCS) are, pursuant to the OCS Lands Act (43 U.S.C. 1333(a)(1)), subject to the navigation laws of the United States and are accordingly considered to be coastwise points of the United States. The effect of this ruling is that the transportation of passengers or merchandise on a non-coastwise qualified vessel between a point in the territorial United States and a marker buoy or wellhead casing on the OCS would be in violation of the coastwise laws.

This ruling is now modified to the extent that marker buoys attached to the OCS are not considered to be "installations" or "other devices" within the meaning of the Act and, therefore, are not points of places embraced within the U.S. coastwise laws. Accordingly the transportation of passengers or merchandise on a non-qualified-vessel between a point in the territorial United States and a marker buoy on the OCS will *not* be in violation of the coastwise laws.

(C.S.D. 84-97)

This ruling holds that merchandise entered under TIB for processing in the United States and then sent to a FTZ for manufacturing may be admitted to Customs territory upon entry and payment of duty (19 U.S.C. 81c).

Date: June 22, 1984
File: DRA-1-09-CO:R:CD:D
216727 GS

Issues: 1. May merchandise, processed under item 864.05 (TSUS) and thereafter transferred to a foreign trade zone for manufacturing, be considered, for Customs purposes, exported?

2. If thereafter the merchandise is used to manufacture new articles, may these articles be admitted to the Customs territory upon payment of the proper duty?

Facts: The request is to import steel coil under TIB, item 864.05; cut it to specifications; transfer it to a foreign trade zone where it will be used to manufacture motor vehicles for exportation and domestic consumption.

Law and analysis: 19 U.S.C. 81c states in pertinent part that:

"Foreign and domestic merchandise of every description, except as prohibited by law, may, without being subject to the Customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone * * *."

This language is direct and clear. All merchandise may be brought into a zone unless it is specifically prohibited from coming into the zone by some provision of the FTZ Act. When such merchandise will be used in manufacturing in a FTZ, it is considered exported (expect when otherwise indicated in the FTZA) for Customs purposes when brought into the zone. If thereafter the merchandise is manufactured in the zone into new and different articles, as 19 U.S.C. 81c permits, the manufactured articles may, upon the payment of proper duty, be admitted to the Customs territory.

Holding: 1. Merchandise processed under item 864.05 (TSUS) and transferred to a foreign trade zone for manufacturing is considered exported for Customs purposes.

2. If thereafter the merchandise is used to manufacture new articles, these articles may be admitted to the Customs territory upon entry and payment of proper duty.

(C.S.D. 84-98)

This ruling holds that motor vehicles are not considered "merchandise" for purposes of 46 U.S.C. 883 when they are driven over land as common carriers from the United States to a foreign country and then transported by foreign vessel to the United States.

Date: June 28, 1984
File: VES-3-06/VES-3-07
CO:R:CD:C 106775 HS

This is in response to your letter of April 16, 1984, requesting a ruling on behalf of your client, (corporation name), concerning a voyage you propose.

According to your letter, a potential customer of your client intends to purchase 50 school buses in Columbus, Ohio, in early June and have them driven, utilizing its own employees, to Vancouver, British Columbia, leaving the United States and entering Canada at Blaine, Washington. Upon arrival in Vancouver, the customer intends to contract with your client to ship the 50 buses from Vancouver to Haines, Alaska, on the foreign-flag, foreign-built (vessel name). You suggest an alternative procedure under which the employees of the customer continue to stay with the buses as passengers until their disembarkation with the buses in Haines, Alaska.

Generally, the coastwise laws (i.e., 46 U.S.C. 289 and 883) prohibit the transportation of merchandise or passengers between points in the United States embraced within the coastwise laws, either directly or via a foreign port, in any vessel other than a vessel built in and documented under the laws of the United States. Title 46, United States Code, section 883, prohibits any part

of the transportation of merchandise between coastwise points in a non-coastwise-qualified vessel.

Regarding the proposed operation set forth in your letter, there is no law administered by the U.S. Customs Service which would prohibit the operation. The proposal involves no transportation of merchandise between coastwise points. The buses, while being driven to Canada, are not considered "merchandise" for purposes of 46 U.S.C. 883. The buses are not being transported from Columbus to Vancouver; they are providing the transportation. The buses do become "merchandise" for purposes of 46 U.S.C. 883 when placed on the (vessel name), but the only transportation of the buses as "merchandise" occurs from Vancouver to Haines, Alaska. Accordingly, "merchandise" is not being carried between coastwise points in the proposed operation.

As your proposed operation does not violate the coastwise laws, there is no reason to address the second alternative set forth in your letter.

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 4

Proposed Customs Regulations Amendments Relating to the Entry and Clearance of Vessels

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations regarding the entry and clearance of vessels. There has been a lack of uniformity in the application of the entry and clearance requirements of the navigation laws to vessels engaged in the lightering of import and export cargo between the U.S. and vessels located beyond the territorial waters of the U.S. This document proposes a clarification of the applicability of the entry and clearance requirements to lighters and other vessels engaged in certain transactions.

Specifically, the document proposes two basic changes. First, a vessel would be required to make entry at a customhouse within 48 hours after arrival in the U.S. if the vessel is returning from another vessel on the high seas after either (1) transporting export merchandise out of the U.S. and transshipping the merchandise to that vessel; or (2) transporting import merchandise to the U.S. after receiving the merchandise from that vessel. Second, an exception would be made to the provision that no vessel shall be cleared for the high seas. It would become necessary for a vessel to obtain clearance if it was bound for another vessel on the high seas to either (1) transship export merchandise which it has transported from the U.S. to that vessel; or (2) receive import merchandise from that vessel and transport the mechandise to the U.S.

DATES: Comments should be received on or before December 3, 1984.

ADDRESS: Comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Paul G. Hegland, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Formal entry of a vessel is now required by § 434 (If an American vessel) or § 435 (if a foreign vessel), Tariff Act of 1930, as amended (19 U.S.C. 1434, 1435). These entry requirements of the navigation laws are derived from provisions of the Act of March 2, 1799 (e.g., section 2774, Revised Statutes of the United States). Regulations implementing these entry requirements are set forth in §§ 4.3 and 4.9, Customs Regulations (19 CFR 4.3, 4.9). Clearance of a vessel is required by § 4197, Revised Statutes, as amended (46 U.S.C. 91). This requirement is derived from § 93 of the Act of March 2, 1799. Regulations implementing the clearance requirement are set forth in §§ 4.60–4.75, Customs Regulations (19 CFR 4.60–4.75).

These vessel entry and clearance requirements of the navigation laws are basic to the proper discharge of primary missions of Customs (i.e., (1) assessment and collection of import duties and taxes, and (2) control of carriers, persons, and articles entering or departing the U.S. and the enforcement of statutory restrictions and prohibitions). Clarification of the applicability of the entry and clearance requirements is considered necessary because of technological advances in water transportation and in the transportation of cargo since the Act of March 2, 1799. This is especially true in recent years with the increased use of vessels to transport import and export cargo between the U.S. and foreign countries via locations on the high seas beyond the territorial waters of the U.S. At those locations the import and export cargo is transshipped to and from lighters and other vessels arriving from and departing for the U.S. with the cargo.

Section 434, Tariff Act of 1930, as amended (19 U.S.C. 1434), uses the language "arriving in the United States from a foreign port or place" and section 4197, Revised Statutes, as amended (46 U.S.C. 91), uses the term "bound to a foreign port." Clarification of these phrases is essential to a proper application of the law. This is particularly true with regard to lighters and other vessels arriving in the U.S. with import cargo transshipped from a vessel on the high seas or bound out of the U.S. with export cargo for transshipment to a vessel on the high seas.

If the entry and clearance requirements of the navigation laws are not applicable to lighters and other vessels transporting import and export cargo in and out of the U.S. from and to vessels located on the high seas, it would be, at least theoretically, possible for the bulk of the import and export cargo of the U.S. to be transported in vessels not subject to statutory entry and clearance requirements

upon arrival at or departure from the U.S. This would clearly be contrary to the legislative purpose sought to be accomplished by the entry and clearance requirements of the navigation laws and would create severe problems for Customs in carrying out the missions of the agency.

An advance notice of proposed rulemaking (ANPRM) regarding this subject was published in the Federal Register on October 14, 1983 (48 FR 46808). That document contains a complete discussion of the initial proposal and relevant court decisions.

Discussion of Comments Received in Response to ANPRM

In response to the ANPRM, nine comments were received from individuals and organizations in the importing community. Eight commenters were in favor of the ideas proposed in the ANPRM. A discussion of the comments follows:

The one commenter opposed to the proposals cautioned that an overly broad or imprecise rulemaking could place unnecessary administrative and financial burdens on the industry and create additional tasks for Customs officers in the Gulf Coast area causing them to overlook other responsibilities or to retard an already slow import/export process. The commenter stated that it believes that Customs present regulations adequately ensure that import duties are paid and statutory prohibitions are enforced but, recognizing Customs concern with the control and documentation of goods and personnel transferred between U.S. ports and international destinations, the commenter suggested several regulatory alternatives which it felt would be less burdensome than the proposals in the ANPRM but still sufficient to satisfy Customs objectives. The four regulatory alternatives suggested by the commenter are:

1. A vessel leaving a U.S. port to lighter foreign cargo for delivery to U.S. ports should not be subject to any further regulatory requirements because such a lightering vessel is entered as if arriving from a foreign port;

2. A vessel leaving a U.S. port to top off a larger vessel with cargo destined for a foreign port should be required to deliver to Customs a report containing information describing the lightering vessel and its crew, the lightered vessel, the proposed location of the delivery, and the quantity and type of cargo to be delivered. A supplemental report would be required on the return of the vessel, after completion of the lightering, only if there were a significant short delivery or if any personnel or goods were brought back from the lightered vessel;

3. A vessel or aircraft delivering stores, supplies, spare parts, or crew members to a vessel in international waters should be required to give 6 to 24 hours advance notice to Customs of the departure of the supply vessel or aircraft and file immediately with the attending Customs inspector or, if none attending, within 1 working day of departure, a report containing information describ-

ing the vessel or aircraft leaving the U.S. and its crew, the receiving vessel, the proposed delivery location, the number of packages of goods in bond, the approximate weight and general description of the domestic stores, supplies, and spare parts, and the name of personnel transported in the supply vessel or aircraft who are to join or visit the receiving vessel. On its return to a U.S. port, the supply vessel or aircraft should file with Customs a report describing the supply vessel or aircraft, the number of packages of goods landed from the receiving vessel, the names of personnel landing from the receiving vessel, and the names of visitors returning from the receiving vessel. (The commenter noted that bonded goods in transit are already supervised by Customs and should require no further action and that goods and personnel being landed would be subject to existing Customs procedures.)

4. Vessels engaged in offshore bunkering operations should be required to file with Customs, within 1 working day of departure from the loading terminal, a report containing information describing the bunkering vessel and its crew, the bunker products on board, the vessel to be bunkered, the location of the bunkering, and the expected date of the bunkering. Such vessels should, within 4 working days of each offshore delivery, file with Customs a report containing information describing the receiving vessel and the bunkers delivered.

Customs does not believe that the regulatory alternatives suggested by the commenter would satisfactorily address the problems stated in the ANPRM. The first situation described by the commenter, in which a vessel departs a U.S. port to lighter foreign cargo from a vessel on the high seas and return the cargo to the U.S., is addressed by the changes considered in the ANPRM. Contrary to the commenter's contentions, if such a vessel were a U.S.-flag vessel, it would not be required to make entry as if arriving from a foreign port (19 U.S.C. 1434), although the *cargo,* of course, would be required to be entered. Furthermore, to control the movement of a vessel lightering cargo destined for the U.S. from a vessel on the high seas, Customs needs notice (i.e., clearance) of the vessel's departure and the information and procedures included in vessel clearance, as well as the information and procedures included in vessel entry, upon the vessel's return from the high seas with the import cargo.

The second situation described by the commenter, in which a vessel departs a U.S. port with foreign-destined (export) cargo which it lighters onto a vessel on the high seas and then returns to a U.S. port, is also addressed in the ANPRM. In this situation, Customs also needs the information and procedures included in vessel entry and clearance. Adoption of the commenter's suggestion would result in new Customs forms and procedures, rather than use of existing forms and procedures, as the changes considered in the

ANPRM would. Thus, the commenter's suggestion could result in more confusion for vessel operators and Customs officers.

The third and fourth situations described by the commenter, involving the transportation of stores, supplies, spare parts, or crew members to a vessel on the high seas, would not be affected by the changes considered. The ANPRM stated that Customs is considering the applicability of the entry and clearance requirements to the transportation by lightering vessels of: (1) export merchandise out of the U.S. to a point on the high seas where the merchandise is transshipped to a vessel for foreign transportation; and (2) import merchandise to the U.S. after transshipment on the high seas from vessels which have transported the merchandise to that point from a foreign country. A vessel arriving in the U.S. to lade bunkers, stores, supplies, spare parts, or crew members under certain circumstances, is exempt from entry by statute (19 U.S.C. 1441(4)) and from clearance by regulation (19 CFR 4.60(b)(3)), if the vessel departs within 24 hours without having landed or taken on board any passengers, or any merchandise other than the bunkers, stores, supplies, or spare parts, and if the report required by 19 U.S.C. 1441(4) is made to Customs. Because such a vessel would be exempt from entry and clearance, assuming that it meets the requirements of 19 U.S.C. 1441(4), Customs believes that such vessel business transacted *outside* U.S. territorial waters also should be exempt from entry and clearance.

Another commenter stated that vessels transacting business with other vessels on the high seas should be required to pay tonnage tax at the rate governed by the location at which the business is transacted. The commenter suggested that guidelines for collection of regular tonnage tax at the $.02 or the $.06 rate should be issued by Customs Headquarters for specific latitudes and longitudes in the Atlantic and Pacific Oceans. The commenter feels that adoption of the changes considered in the ANPRM would result in better vessel and cargo control, improved statistics on bunkers, more tonnage tax and vessel entry and clearance fees being collected, and better statistics concerning vessel movements.

Because the $.02 regular tonnage tax rate is applicable to vessels arriving from a foreign port or place in North America, Central America, the West Indies, the Bahama Islands, the Bermuda Islands, Newfoundland, or the coast of South America bordering on the Caribbean Sea (considered to include the mouth of the Orinoco River) (section 4.20(a), Customs Regulations), Customs does not believe that special guidelines are necessary for the determination whether the $.02 or $.06 regular tonnage tax rate would be applicable to a vessel arriving in the U.S. after lightering another vessel on the high seas. Virtually all of such lightering activities would occur nearer either the U.S. or a foreign location subject to the $.02 regular tonnage tax rate than a foreign location subject to the $.06 regular tonnage tax rate. The proposed amendments to Part 4, Cus-

toms Regulations, contained in this document include an amendment to make the $.02 regular tonnage tax rate applicable to vessels entered in any port of the U.S. from the high seas adjacent to the U.S. or the foreign locations subject to the $.02 regular tonnage tax rate.

One commenter was concerned that the changes discussed in the ANPRM would affect vessels operating between the U.S. and a deepwater port. These vessels include service and bunker vessels which operate solely for the benefit of tankers using the deepwater port, providing supplies and transportation for the tankers and their crews, and mooring launches and workboat/maintenance vessels used for functions of the deepwater port's marine terminal. The commenter stated that none of these vessels are used to transport import or export merchandise to or from vessels on the high seas. The vessel operations described by the commenter are clearly not within the purview of the considered changes.

Another commenter gave four suggestions which are as follows: (1) the transshipment site should be indicated by latitude and longitude on all formal entry documents; (2) the importing vessel should be subject to all applicable fees and tonnage taxes; (3) the transshipped quantities must agree with the original bills of lading; and (4) the history of the cargo shipment should be clearly documented on the Customs Form 1302 since more than one transfer may occur.

Although Customs agrees with all of the suggestions, the first, third and fourth suggestions are not being included as part of the proposed amendments in this document because they are in the nature of operational matters which would be the subject of a Customs Directive if the amendments are adopted. The second suggestion is included within the proposed amendments.

The other commenters enthusiastically supported the proposed changes. They felt that there is a definite need for clarification in this area and establishing definite guidelines would simplify procedures relative to entry and clearance of lightering vessels.

Discussion of Proposed Amendments to Part 4

Part 4, Customs Regulations, relates to vessels in foreign and domestic trade. It is proposed to amend § 4.3, which relates to vessels required to make entry, by adding a new paragraph (c). This change is necessary because a vessel would be required to make entry at a customhouse within 48 hours after arrival in the U.S. if the vessel is returning from another vessel on the high seas after either (1) transporting export merchandise out of the U.S. and transshipping the merchandise to that vessel; or (2) transporting import merchandise to the U.S. after receiving the merchandise from that vessel.

It is proposed to amend § 4.9(a), which relates to formal entry of vessels, by adding the parenthetical phrase "(see § 4.3(c))" after the

words "foreign port or place". This change is necessary to alert interested persons to a new vessel entry requirement.

It is proposed to amend § 4.20(a), which relates to tonnage taxes, by adding the words "or the high seas adjacent to the United States or the above listed foreign locations" after the listing of various foreign ports and places. This change is necessary because the definition of a "foreign port or place", from which vessels should be entered in a port of the U.S., would now include the *high seas* adjacent to the U.S. as well as the *high seas* adjacent to other parts of North America, Central America, the West Indies, the Bahama Islands, the Bermuda Islands, Newfoundland, and the coast of South America bordering on the Caribbean Sea (considered to include the mouth of the Orinoco River). Thus, vessels transacting business with other vessels on the high seas in these geographic areas and then making entry at ports in the U.S. would be required to pay tonnage tax at the rate governed by the location at which the business is transacted.

It is proposed to amend § 4.60(e), which relates to vessels bound for foreign ports and therefore required to clear, by requiring a vessel to be cleared for the high seas only if it was bound for another vessel on the high seas to either (1) transship export merchandise which it has transported from the U.S. to that vessel; or (2) receive import merchandise from that vessel and transport the merchandise to the U.S.

Executive Order 12291

This document will not result in a regulation which is a "major rule" as defined by § 1(b) of Executive Order 12291.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to these amendments because the rule, if adopted, will not have a significant economic impact on a substantial number of small entities nor impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Accordingly, it is hereby certified under the provisions of § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

Comments

Before adopting this proposal, consideration will be given to any written comments, preferably in triplicate, that are submitted timely to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with the Freedom

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of Information Act (5 U.S.C. 552) and § 1.6, Treasury Department Regulations (31 CFR 1.6) and § 103.11(b)), Customs Regulations (19 CFR 103.11(b)), on regular business days between 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Authority

This document is issued under the authority of R.S. 251, as amended, 2793, as amended, 4197, as amended, 4219, as amended, 4225, as amended, sec. 3, 23 Stat. 119, as amended, secs. 434, 435, 441, 624, 46 Stat. 711, as amended, 712, as amended, 759, 58 Stat. 705, 76 Stat. 72; 5 U.S.C. 301, 19 U.S.C. 66, 288, 1434, 1435, 1441, 1624, 42 U.S.C. 269, 46 U.S.C. 3, 91, 111, 121, 123, 128, 2103, 8103, Gen. Hdnt. 11, Tariff Schedules of the United States (19 U.S.C. 120).

Drafting Information

The principal author of this document was James S. Demb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects

19 CFR Part 4

Cargo vessels, Exports, Fishing vessels, Freight, Harbors, Passenger vessels, Reporting requirements, Seamen, Tonnage taxes, Vessels.

Proposed Amendments to the Regulations

It is proposed to amend Part 4, Customs Regulations (19 CFR Part 4), as set forth below.

Part 4—Vessels in Foreign and Domestic Trades

1. It is proposed to amend § 4.3 by adding a new paragraph (c) to read as follows:

§ 4.3 Vessels required to enter.

* * * * * * *

(c) For purposes of the vessel entry requirement in this section and § 4.9, a "foreign port or place" shall include a vessel on the high seas when the vessel arriving in the United States is returning from the vessel on the high seas after having—

(1) transported export merchandise out of the United States to the vessel on the high seas and there transshipped the merchandise to that vessel; or

(2) transported import merchandise to the United States from the vessel on the high seas after having there received the merchandise from that vessel.

2. It is proposed to amend the second sentence of § 4.9(a) by adding the parenthetical phrase "(see § 4.3(c))" after the words "foreign port or place."

3. It is proposed to amend the first sentence of § 4.20(a) by removing the word "or" after the word "Newfoundland," and adding the words "or the high seas adjacent to the United States or the above listed foreign locations" after the words "Orinoco River),".

4. It is proposed to revise § 4.60(e) to read as follows:

§ 4.60 Vessels required to clear.

* * * * * * *

(e) No vessel shall be cleared for the high seas, *except,* a vessel bound to another vessel on the high seas to—

(1) transship export merchandise which it has transported from the United States to the vessel on the high seas; or

(2) receive import merchandise from the vessel on the high seas and transport the merchandise to the United States.[93]

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: September 12, 1984.
EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1984 (49 FR 39072)]

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19 CFR Parts 6 and 24

Proposed Customs Regulations Amendments Relating to Progressive Clearance of Aircraft

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations relating to progressive clearance for airlines that commingle domestic (stopover) passengers, who arrived on an earlier flight and have already cleared Customs at their first United States port of arrival and are continuing on to another United States destination, with international passengers who are arriving at their first United States port of arrival and have not yet cleared Customs. The amendments, if adopted, would implement progressive clearance procedures to be followed by airlines which would enable Customs to be reimbursed for the additional cost of reinspecting domestic (stopover) passengers at the same time the international passengers are being inspected for the first time.

DATES: Comments must be received on or before December 3, 1984.

ADDRESS: Comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Vincent J. Dantone, Office of Inspection and Control, (202–566–5607). Legal Aspects: John Mathis, Carriers, Drawback and Bonds Division, (202–566–5706) U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, Customs inspects passengers when they arrive at their first port of arrival in the United States. If a plane carrying international passengers who have yet cleared Customs stops temporarily at a port of arrival in the United States to pick up domestic (stopover) passengers, who arrived on an earlier flight and have already cleared Customs, before continuing to a final United States destination, standard Customs procedure is to inspect all arriving international passengers before the domestic passengers board the plane. This procedure eliminates the commingling of domestic passengers, who have already cleared Customs, with international passengers who have not cleared Customs. As a result, all passengers heading for the final United States destination have cleared Customs and there is no possibility of international passengers passing contraband to domestic passengers not subject to further inspection, or other such fraudulent practices.

However, the increasingly high cost to the airlines of having their planes wait on the ground at the initial location while the international passengers are inspected before the boarding of the domestic passengers, has prompted the airlines to request that inspection of the international passengers be deferred to the final destination. In such a case Customs would be required to reinspect the domestic passengers due to the commingling of inspected and uninspected passengers.

Pursuant to these requests, Customs has entered into voluntary agreements with several airlines that specify compliance with specific requirements before approval will be granted by Customs for the progressive clearance of flights when inspected domestic (stopover) passengers are commingled with international passengers who have not yet cleared Customs. Information regarding specific carriers that have signed these agreements may be obtained from Customs.

One of the requirements of each agreement is that the airlines reimburse Customs for the additional costs of reinspection at the rate of $2.00 per domestic (stopover) passenger. The airlines have agreed to pay this progressive clearance fee and Customs may assess it pursuant to the User Charges Statute, (31 U.S.C. 9701), which states that a Federal agency is required to charge appropriate fees to recover the costs of special services provided by that agency. The fees must be fair and based on the costs to the Government, value to the recipient, public policy or interest served, and other pertinent facts. This fee is in addition to any other charges currently incurred, except overtime reimbursed by the airlines under the Customs overtime laws (19 U.S.C. 267, 1451). In those cases where Customs is reimbursed by the airlines under 19 U.S.C. 1451, the fee will not be charged.

In addition to paying the reinspection fee, the airlines must also; (1) arrange for the checked baggage of all passengers requiring reinspection on the previously-described flights to be off-loaded and made available for examination in the Federal inspection area at the destination port (intermediate or final) where an inspection is to take place; (2) notify, in writing, all stopover passengers, prior to boarding, that they will be subject to full reinspection by Customs; (3) provide to the domestic (stopover) passenger a Customs declaration identified by the words "Domestic Flight". The domestic (stopover) passenger is only required to complete Items 1–4 on the declaration; and (4) make available to Customs the permit to proceed and/or the general declaration, which clearly indicates the number of domestic (stopover) passengers to be reinspected upon arrival at the destination port (intermediate or final) where an inspection of passengers is to take place. An airline that wishes to terminate the permit to proceed granted upon compliance with these requirements must provide Customs a minimum of 30 days written notice before a scheduled change.

COMMENTS

Although this procedure went into effect as of January 1, 1984, based on voluntary agreements with the affected airlines, before adopting the regulation as a permanent rule, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be made available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

It has been determined that these proposed amendments are not a "major rule" within the criteria provided in section 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

REGULATORY FLEXIBILITY ACT

Although Customs does not believe that these amendments, if adopted, will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601–612), we will continue to review this matter and will consider any comments submitted thereon before issuing a final rule.

AUTHORITY

These amendments are proposed under the authority of R.S. 251, as amended, sec. 624, 46 Stat. 759, 5 U.S.C. 301, 19 U.S.C. 66, 1467, 1624, 31 U.S.C. 483a, 9701, Gen. Hdnote 11, Tariff Schedules of the United States (19 U.S.C. 1202).

DRAFTING INFORMATION

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR

Part 6
Air carriers, Air transportation, Aircraft, Airports, Freights.

Part 24
Customs fees, Accounting.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Parts 6 and 24, Customs Regulations (19 CFR Parts 6, 24), as set forth below.

PART 6—AIR COMMERCE REGULATIONS

It is proposed to amend Part 6 by adding a new section 6.9(f), to read as follows:

6.9 Residue Cargo and Passengers not Previously Cleared.

* * * * * * *

(f) Airlines that commingle domestic (stopover) passengers; that is, passengers who have already cleared Customs at their first United States port of arrival and are continuing on another aircraft to a second United States destination, with international passengers who are arriving at their first United States port of arrival

and have not yet cleared Customs must comply with certain requirements before being issued a permit to proceed. These requirements are as follows:

(1) The domestic (stopover) passengers must be transported on United States-registered aircraft, or on foreign-registered aircraft of the same foreign airline that brought them into the United States.

(2) Pay a $2.00 charge per domestic (stopover) passenger reinspected in the United States (See section 24.12 of this chapter).

(3) Arrange for the checked baggage of all passengers requiring reinspection on the previously described flights to be off-loaded and made available for examination in the Federal inspection area at the destination port (intermediate or final) where an inspection is to take place.

(4) Notify, in writing, all stopover passengers, prior to boarding at the reinspection point, that they will be subject to full reinspection by Customs. This written notification will contain the following language: "Notice to all boarding passengers: You are boarding an aircraft on which passengers will be arriving in the U.S. from foreign destinations. These passengers have not yet cleared U.S. Customs. Accordingly, you will be subject to a full reinspection by Customs at your final U.S. port of entry."

(5) Provide to the domestic (stopover) passenger a Customs declaration identified by the words "Domestic Flight". The domestic (stopover) passenger is only required to complete Items 1–4 on that declaration.

(6) Make available to Customs the permit to proceed and/or the general declaration, which clearly indicates the number of domestic (stopover) passengers to be reinspected upon arrival at the destination port (intermediate or final), as otherwise required by law, where an inspection of passengers is to take place.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

It is proposed to amend Part 24 by adding a new paragraph (d) to read as follows:

24.12 Customs fees; charges for storage.

* * * * * * *

(d) Pursuant to the progressive clearance procedures set forth in section 6.9(f) of this chapter, when airlines commingle domestic (stopover) passengers, who have already cleared Customs at their first United States port of arrival and are continuing on to another United States destination, with international passengers who are arriving at their first United States port of arrival and have not yet cleared Customs, a progressive clearance fee of $2.00 per domestic (stopover) passenger reinspected in the United States will be charged by Customs to the affected airlines to offset the additional cost to Customs of reinspecting passengers who have already been cleared in the United States. The fee is in addition to any other

charges currently incurred, such as overtime services, but will not apply to passengers reinspected on an overtime basis if the cost of performing such reinspection is reimbursed to Customs in accordance with 19 U.S.C. 1451. The fee will not apply to the reinspection of non-revenue passengers, including but not limited to, employees of the carrier and their dependents, deadhead crew, employees of other carriers who may be assessed a service charge by the transporting carrier, and other persons to whom the carrier is authorized to provide free transportation pursuant to 14 CFR 223. The airline industry will be notified at least 90 days in advance of the date of any changes in the amount of the fee necessitated by either an increase or decrease in costs to Customs, but no new fee shall take effect before January 1, 1986.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: September 12, 1984.
EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1984 (49 FR 39075)]

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19 CFR Part 19

Proposed Customs Regulations Amendment Relating to the Relocation or Alteration of Container Stations

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide a procedure for the relocation or alteration of an approved container station and the payment of an appropriate fee to Customs to reflect the services provided. The provision for relocation and alteration of container stations is necessary to conform the regulations concerning container stations to those concerning bonded warehouses, wherein relocation or alteration is provided for, and to recover Customs costs for services rendered. The fee requirement is necessary because of the policy that Federal agencies charge appropriate fees for providing special benefits to identifiable recipients above and beyond those which accrue to the general public.

DATE: Comments must be received on or before December 3, 1984.

ADDRESS: Comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Donald Thompson, Office of Cargo Enforcement and Facilitation, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5354).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Container stations are secured areas within the U.S. into which containers of imported merchandise may be moved for the purpose of opening the container and delivering the contents before an entry is filed with Customs or duty is paid. A container station serves as a central location at a port for processing containerized merchandise which otherwise could not be handled timely at the dock, wharf, pier, or bonded carrier's terminal.

Sections 19.40 through 19.49, Customs Regulations (19 CFR 19.40–19.49), set forth the procedures for the establishment and use of container stations. To establish a container station under section 19.49, Customs Regulations, an application must be filed with the district director of Customs. Before the application may be approved, Customs must: (1) determine that the application is in proper form; (2) survey the premises to determine that all physical requirements are met; (3) perform a background investigation of the applicant and the applicant's officers and employees; (4) prepare a report of that investigation; and (5) review the application, survey, and background investigation report, and prepare a response to the applicant.

Customs recently amended section 19.40, to provide that a fee, calculated in accordance with section 24.17(d), Customs Regulations (19 CFR 24.17(d)), must accompany an application to establish a container station. The amendment was published in the Federal Register on March 9, 1983, as T.D. 83–56 (48 FR 9853). The fee is based upon the amount of time the average service requires of the Customs officers performing the service. It is in accord with 31 U.S.C. 9701, under which a Federal agency may charge appropriate fees to recover the costs of services provided by that agency.

Although the present regulations provide for the establishment of a container station and the collection of an establishment fee, they do not make any provisions for the relocation or alteration of a container station, as they do for a bonded warehouse. Section 19.3(a), Customs Regulations (19 CFR 19.3(a)), provides for the relocation or alteration of bonded warehouses. It is proposed to amend section 19.40, to provide not only for the establishment of a container station, upon payment of a fee, but also the relocation or alteration of a container station within the same Customs district, also upon payment of a fee. The fee for relocation and alteration would be $382, which is equivalent to the fee charged for such services at a bonded warehouse. By T.D. 84–45, published in the Federal Register on February 21, 1984 (49 FR 6433), this was the fee es-

tablished by Customs to reimburse it for services relating to the relocation or alteration of a bonded warehouse. The services provided by Customs in altering or relocating a container station are essentially the same as those provided in altering or relocating a bonded warehouse.

As with the fee charged for establishing a container station, which was included in T.D. 83-56, the fee for relocating or altering a container station would be revised periodically to reflect increased costs for Customs services. A schedule listing the revised fees to be charged by Customs for relocating or altering a container station, as well as establishing a container station, would be published in the Federal Register and Customs Bulletin. The fee schedule would remain in effect until changed.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 1.6, Treasury Department Regulations (31 CFR 1.6), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This amendment is proposed under the authority of R.S. 251, as amended, 77A Stat. 14, sec. 499, 46 Stat. 728, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1202 (Gen Hdnts. 1-6, 11, 12, Tariff Schedules of the United States) 1499, 1624).

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is hereby certified that if adopted, the proposed amendment set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 19

Customs duties and inspection, Imports, Freight, Container stations.

PROPOSED AMENDMENT

It is proposed to amend Part 19, Customs Regulations (19 CFR Part 19), as set forth below:

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

It is proposed to amend § 19.40 in the following manner:

1. It is proposed to revise the section heading to read, "§ 19.40 Establishment, relocation or alteration of container stations."

2. It is proposed to amend the first sentence of paragraph (a) by removing the reference to "paragraph (b)" and inserting, in its place, the reference to "paragraph (c)".

3. It is proposed to redesignate paragraphs (b)(1) and (b)(2) as paragraphs (c)(1) and (c)(2), and to add a new paragraph (b) to read as follows:

(b) Alterations to or relocation of a container station within the same district may be made with the permission of the district director of the district in which the facility is located. An application to alter or relocate a container station shall be accompanied by the fee required by paragraph (c) of this section.

4. It is proposed to revise the text of proposed redesignated paragraph (c)(1) to read as follows:

(c)(1) Customs shall charge a fee to establish, relocate or alter a container station, and publish a general notice in the Federal Register and Customs Bulletin setting forth a fee schedule, to be revised periodically to reflect increased costs, to establish, relocate or alter the container station. The published revised fee schedule shall remain in effect until changed.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: September 12, 1984.

EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

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U.S. Court of Appeals for the Federal Circuit

(Appeal No. 83-1401)

AMERICAN HOSPITAL SUPPLY CORPORATION AND MASSACHUSETTS GENERAL HOSPITAL, APPELLANTS, *v.* TRAVENOL LABORATORIES, INC., PFRIMMER & COMPANY, AND U.S. INTERNATIONAL TRADE COMMISSION, APPELLEES

(Decided: September 26, 1984)

E. Anthony Figg, of Washington, D.C., argued for appellants. With him on the brief were *G. Franklin Rothwell* and *Scott M. Daniels.*

Granger Cook, Jr., of Chicago, Illinois, argued for appellees, Travenol Laboratories, Inc., et al.

John R. Crossan, Paul C. Flattery, Lawrence W. Flynn and *Max D. Hensley,* of Chicago, Illinois, of counsel.

William E. Perry, of Washington, D.C., argued for appellee International Trade Commission. With him on the brief were *Michael H. Stein,* General Counsel, and *Michael P. Mabile,* Assistant General Counsel.

Appealed from: U.S. International Trade Commission.
No Judge.

Before SMITH, *Circuit Judge,* SKELTON, *Senior Circuit Judge,* and NIES, *Circuit Judge.*

SMITH, *Circuit Judge.*

In this unfair competition case under 19 U.S.C. § 1337 (1982), appellants American Hospital Supply Corporation and Massachusetts General Hospital (American) appeal from the determination of the U.S. International Trade Commission (Commission), that appellees Travenol Laboratories, Inc., and Pfrimmer & Company (Travenol) are not in violation of section 1337 because they do not infringe Fischer, U.S. patent No. 3,950,529 (the Fischer '529 patent). We affirm.

The Claimed Invention

The Fischer '529 patent, which is assigned to American, relates to an amino acid nutritional formulation for patients with liver disease, and a method of using that formulation. The formulation is a mixture of amino acids falling within a specific range of proportions. The formulation can be administered either intravenously or orally.

Liver-diseased patients need to receive sufficient protein for adequate nutrition, yet, these patients sometimes develop intolerance to protein which can result in hepatic encephalopathy,[1] which can in turn lead to coma or death. By restricting protein intake, the tendency of a liver-diseased patient to develop hepatic encephalopathy can be reduced; however, limitation of protein intake can lead to malnutrition. The claimed Fischer formulations are intended to provide adequate nutritional support while reducing the incidence or severity of hepatic encephalopathy. They are also used as a treatment for hepatic encephalopathy.

Claim 1 of the Fischer '529 patent is representative of the claims alleged to be infringed:

An amino acid formulation for administration to human patients with liver disease, comprising a mixture of the following essential and nonessential amino acids combined in proportions defined by the following interrelated molar ranges:

Amino acids	Molar ranges
L-isoleucine	0.0549–0.0823
L-leucine	0.0670–0.101
L-valine	0.0574–0.0861
L-tryptophan	0.000816–0.00441
L-phenylalanine	0–M
L-tyrosine	0–0.00300
L-lysine	0.0333–0.0500
L-methionine	0.00491–0.0147
L-threonine	0.0228–0.0454
L-alanine	0.0686–0.103
L-arginine	0.0275–0.0413
L-histidine	0.0124–0.0186
L-proline	0.0556–0.00834
L-serine	0.0152–0.0571
glycine	0.0451–0.144
L-aspartic acid	0–0.0451
L-glutamic acid	0–0.0702
L-ornithine	0–0.0382
L-cysteine	0–0.00228

wherein M represents the upper limit of the range for phenylalanine and is equal to 0.009 minus the respective molar amount of tyrosine present in said mixture, the combined molar amounts of phenylalanine and tyrosine being at least equal to 0.002 on the same respective molar basis, the respective molar proportions of

[1] Hepatic encephalopathy is a condition characterized by a depressed mental state, impaired consciousness, decreased intellectual performance, and an altered personality.

isoleucine, leucine, valine, tryptophan, phenylalanine, and tyrosine being selected from the above molar ranges thereof so that the ratio of the combined molar proportions of isoleucine, leucine, and valine to (a) the molar proportion of tryptophan is within the numerical range from 40 to 300, and to (b) the combined molar proportion of phenylalanine and tyrosine is within the numerical range from 15 to 135.

Background

In 1949, Dr. William C. Rose published studies establishing minimum amounts of 20 amino acids needed by healthy persons—the "Rose pattern." Of these, eight amino acids are identified as essential,[2] two are sometimes identified as semi-essential,[3] and the balance are deemed nonessential.[4] The principal function of the normal liver in the human body is to regulate the levels of certain amino acids in the blood.

Proteins are normally obtained from food and are broken down into amino acids before they can be used for nourishment in the human body. Due to illness, surgery, or injury, however, some persons cannot gain nutritionally adequate quantities of protein through the alimentary tract and quickly develop malnutrition. Intravenous administration of amino acids formerly compensated partially for a patient's protein deficit. In the 1940's amino acid hydrolysates were prepared from proteins such as milk protein or hen's egg protein. By the mid-1960's, however, all of the amino acids necessary for human nutrition had become available in pure form at a reasonable cost. Further, surgical techniques for administration of nutritionally adequate quantities of amino acids had also become available.

The technique of providing nutritionally adequate quantities of amino acids intravenously—hyperalimentation[5]—could not be used with all patients, however. Most people with liver disease can be treated by controlling their diet. Some patients with liver disease, particularly cirrhosis, develop hepatic encephalopathy or coma when fed protein. Consequently, malnutrition presents a serious problem to these patients.

Ammonia is formed in the gut from the breakdown of proteins. Based on observations showing an abnormally high ratio of ammoniagenic amino acids in the plasma of patients with certain liver diseases, it is thought by some that when the liver is not functioning properly excess ammonia builds up resulting in hepatic encephalopathy. In the early 1970's ammonia was thought to be the

[2] The essential amino acids cannot be synthesized by the human body. Consequently, they must be provided by the diet or by other products which can be broken down into essential amino acids. The essential amino acids are valine, leucine, isoleucine, threonine, phenylalanine, tryptophan, methionine, and lysine.

[3] The "semi-essential" amino acids are histidine and arginine.

[4] The human body can synthesize the nonessential amino acids from products such as ammonia, carbohydrates, other nitrogen sources, and essential amino acids.

[5] Dr. Stanley Dudrick perfected a surgical technique for inserting a cannula—a small tube—into deep veins for administering concentrated nutritional solutions. This technique became known as hyperalimentation.

principal cause of hepatic encephalopathy and this theory is still widely accepted.

In a 1973 paper,[6] Dr. Rudman classified the ammoniagenic tendencies of amino acids metabolized in patients with liver disease.[7] Conventional treatments for controlling plasma ammonia levels, however, were not always successful; they sometimes caused malnutrition and did not always prevent hepatic encephalopathy.

In 1971, Dr. Fischer published an article [8] presenting an alternative hypothesis that some of the neurological and cardiovascular complications of hepatic failure could be caused by abnormally high levels of "aromatic" amino acids [9] relative to "branched chain" amino acids [10] in the plasma of liver-diseased patients. Fischer suggested that the aromatic and branched chain amino acids compete for passage into the brain, across the "blood-brain barrier." Branched chain amino acids are not regulated by the liver but, rather, through other metabolic pathways independent of the liver. The levels of aromatic amino acids in the plasma are regulated by the liver and, consequently, there is some relationship between a damaged liver and abnormally high levels of aromatic amino acids in the plasma. In liver-diseased patients the levels of aromatic amino acids are elevated, while the levels of branched chain amino acids are decreased. Fischer thought that aromatic amino acids were precursors of false neurotransmitters which disrupted normal brain functioning in patients with hepatic encephalopathy. Thus, Fischer proposed that hepatic encephalopathy may be caused by the excessive levels of aromatic, relative to branched chain, amino acids in the plasma.

It was known that certain amino acids were elevated in patients with specific types of liver disease. Prior to 1974, "normalization" of amino acid levels for patients with a specific enzyme deficiency was known. In normalization, a diet abnormally low in certain amino acids is given to patients whose levels in those amino acids prior to treatment were abnormally high, and vice versa. Normalization was not, however, a conventional treatment for patients with liver disease.

In 1972, Fischer entered into a collaborative research effort with American to formulate an amino acid product for patients with liver disease. The work initially involved two intravenous amino acid formulations: FreAmine, an amino acid product for patients with kidney disease, and FreAmine E, an experimental formulation. The results of that research effort, up to early 1973, were published in 1974.[11]

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[6] Rudman, et al., *Comparison of the Effect of Various Amino Acids Upon the Blood Ammonia Concentration of Patients with Liver Disease,* 26 Am. J. of Clinical Nutrition 916 (1973).

[7] Threonine, serine, glycine, glutamine, histidine, lysine, and asparagine were shown to be the most ammoniagenic of the amino acids.

[8] Fischer & Baldessarini, *False Neurotransmitters and Hepatic Failure,* 2 LANCET 75 (1971).

[9] The aromatic amino acids are tryptophan, phenylalanine, and tyrosine.

[10] The branched chain amino acids are isoleucine, leucine, and valine.

[11] Fischer, et al., *Plasma Amino Acids in Patients with Hepatic Encephalopathy,* 127 AM. J. OF SURGERY 40 (1974).

In the 1974 article Fischer suggested modifying amino acid formulations to normalize the pattern of amino acids in the plasma of patients with liver disease. The FreAmine E preparation tested by Fischer consisted of only the eight essential amino acids conforming to the Rose pattern. To Fischer's surprise, FreAmine E failed to increase the low plasma concentration of branched chain essential amino acids even though FreAmine E contained 2½ times the minimum requirements of branched chain amino acids recommended by Rose.

Following oral presentation in May 1973 of the report later published as the 1974 Fischer article, Fischer and Dr. Yoshimura devised a modified formulation intended to normalize plasma amino acid levels in liver-diseased patients. They called the formulation "F080." The ratio of branched chain to aromatic amino acids was much higher in the F080 formulation than in FreAmine. Fischer performed animal tests with the F080 formulation in 1974. Animals in a coma or near comatose states with simulated liver disease awakened when given the F080 formulation.

On August 17, 1972, Ghadimi filed an application for an "Injectable Amino Acid Composition Commensurate to the Anabolic Need of the Body and Method of Using Same." U.S. patent No. 3,832,465 (the Ghadimi patent) issued to Ghadimi on August 27, 1974, claiming a nutritional amino acid formulation. The Ghadimi patent does not address the specific problems of patients with liver disease but, rather, provides a formulation for the nutritional needs of patients from a variety of age groups—newborn to adult.

On February 3, 1975, Fischer filed application serial No. 546,689. On the basis of that application, the Fischer '529 patent issued on April 13, 1976. The claims were allowed without discussion or amendment.

In May 1979, American began selling an amino acid formulation for liver-diseased patients made in accordance with claim 1 of the Fischer '529 patent as an enteral (food) product under the trademark "Hepatic-Aid." Travenol introduced a competing enteral amino acid formulation for nutritional support for liver-diseased patients, in the United States market in September 1981, under the trademark "Travasorb Hepatic."

Proceedings Below

On July 12, 1982, American filed with the U.S. International Trade Commission a complaint alleging violations by Travenol of 19 U.S.C. § 1337 (1982). The Commission investigated American's claim of infringement of claims 1, 5, and 14, and of contributory infringement and inducing infringement of claims 1, 5, 6, 7, 9, and 14, of the Fischer '529 patent. In an initial determination issued May 23, 1983, the presiding official held that the Fischer '529 patent is not invalid, is enforceable, and is not infringed by Travenol.

The presiding official rejected Travenol's contentions that the claims are invalid under 35 U.S.C. § 112 for vagueness, ambiguity, or indefiniteness, under section 102(e) in view of the Ghadimi patent, or under section 103 for obviousness in view of the 1974 Fischer article and the Ghadimi patent. While American was found to have misrepresented, and to have failed to disclose, certain information to the Patent and Trademark Office (PTO) during prosecution, that information was not found to be material, and the Fischer '529 patent was held to be enforceable. The Fischer '529 patent was not found to be infringed by Travenol because of difference between the claimed and the Travenol formulations. The presiding official evaluated equivalence at the time the invention was made and declined to recognize the reduced amounts of one amino acid in the Travenol formulation as equivalent to the claimed amount of that amino acid despite evidence that the minimum requirement of that amino acid was reduced subsequent to the time of Fischer's invention. In view of the alternative ammoniagenic theory of causation of hepatic encephalopathy, the presiding official concluded that American failed to meet its burden of proving that Travasorb Hepatic worked in substantially the same way as the claimed formulation.

The Commission declined to review the intitial determination of no violation and, accordingly, the initial determination became final on June 22, 1983.[12] American appeals.

Issues

Three principal questions are raised by the parties [13] on appeal:

(1) Whether the asserted claims are invalid under either section 102(e) or section 103;

(2) Whether the appealed claims are unenforceable because of alleged misrepresentations or omissions made by American during prosecution of the Fischer '529 patent; and

(3) Whether Travasorb Hepatic infringes the asserted claims under the doctrine of equivalents.

Validity

Travenol contends that, while the Commission's determination that Travenol has not violated section 1337 is correct, the asserted claims are clearly invalid under section 102 or section 103 or both.

Travenol asserts that the Commission entered a variety of clearly erroneous findings of fact with respect to the teachings of the references. Many of these, however, are straw men stuffed with Travenol's misinterpretations of the Commission's findings. Fur-

[12] 48 Fed. Reg. 31306 (1983).

[13] This court on November 3, 1983, denied American's motion to exclude or strike issues 2, 3, 4, and 5 contained in Travenol's "Counterstatement of the Issues for Appeal." The instant case, in which the Commission's determination not to review applied to the full initial decision, is unlike *Beloit Corp.* v. *Valmet Oy*, No. 84-1296 (order) (Fed. Cir. Aug. 31, 1984), where the Commission specifically adopted only a portion of the presiding official's initial decision.

ther, we are not persuaded that the biochemistry involved was "predictable," as Travenol claims. Travenol ignores the findings and the evidence with respect to the complexity of normalizing plasma amino acid levels and with respect to the uncertainty surrounding the competing theories of treatment of hepatic encephalopathy.

The Fischer '529 patent claims a specific range of amino acid formulations for patients with liver disease. Contrary to the implication of some of Travenol's arguments, it does not claim the concept of normalizing plasma amino acid levels in the abstract.

Anticipation

Travenol asserts that the claims in issue are anticipated by the Ghadimi patent. In *Kalman* v. *Kimberly-Clark Corp.*,[14] this court stated:

> A party asserting that a patent claim is anticipated under 35 U.S.C. § 102 must demonstrate among other things, identity of invention. * * * [I]dentity of invention is a question of fact, * * * and one who seeks such a finding must show that each element of the claim in issue is found, either expressly described or under principles of inherency, in a single prior art reference, or that the claimed invention was previously known or embodied in a single prior art device or practice. * * *

Travenol argues that the Commission's failure to recognize Ghadimi's teachings with respect to normalization is clearly erroneous and that the Commission erred in emphasizing the nonoverlapping portions of the ranges in the Ghadimi patent. We disagree.

First, we do not review the findings of the Commission under the clearly erroneous standard applicable to the findings of a district court as provided in Fed. R. Civ. P. 52(a). We review the factual findings of the Commission to determine whether they are unsupported by substantial evidence. We are not bound by the Commission's legal conclusions.[15]

While the Ghadimi patent teaches normalization of plasma amino acid levels, it does not disclose a formulation falling within the ranges of amino acids claimed by Fischer. Travenol's attempt to make out anticipation by drawings the court's attention to the overlap between portions of the Ghadimi ranges and the claimed ranges of amino acids—16 of 19 amino acids—appears to be little more than a diversion of attention from the three claimed amino acid ranges which Ghadimi does not disclose.[16]

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[14] *Kalman* v. *Kimberly-Clark Corp.*, 713 F.2d 760, 771, 218 USPQ 781, 789 (Fed. Cir. 1983).

[15] 19 U.S.C. § 1337(c) (1982); 5 U.S.C. § 706 (1982); *SSIH Equip. S.A.* v. *U.S. Int'l Trade Comm'n*, 718 F.2d 365, 371, 218 USPQ 678, 684 (Fed. Cir. 1983); *General Motors Corp.* v. *U.S. Int'l Trade Comm'n*, 687 F.2d 476, 215 USPQ 484 (CCPA 1982), *cert. denied*, 459 U.S. 1105 (1983).

[16] The ranges for threonine and proline disclosed by Ghadimi are lower than the ranges claimed in the Fischer '529 patent. The range for cysteine is higher than the claimed range. The ranges for these three amino acids disclosed in Ghadimi do not overlap the ranges claimed for those amino acids in the Fischer '529 patent.

While Ghadimi discloses a formulation using all of the 19 amino acids in the Fischer patent, it does not disclose any amino acid formulation that meets the asserted claims. There is no identity of invention. Thus, we conclude that the Commission's findings, that the asserted clams of the Fischer patent are not anticipated by Ghadimi, is supported by substantial evidence. The asserted claims of the Fischer '529 patent are not valid under section 102(e).

Obviousness

Travenol also argues that the asserted claims are invalid for obviousness under section 103 in view of either the 1974 Fischer article or the Ghadimi patent or both. Several of the Commission's findings of fact and statements of the law are designated by Travenol as clearly erroneous [17] and erroneous, respectively. The Commission employed the *Graham* v. *John Deere Co.*[18] criteria in determining whether the asserted caims would have been obivous under section 103. Travenol's attack is leveled primarily at the Commission's findings with respect to the unpredictibility of normalization techniques and with respect to the teachings of the 1974 Fischer article and the Gahdimi patent in terms of what would have been obvious to one of ordinary skill in the art.

There is no dispute with respect to the scope and content of the prior art—all parties agree that the 1974 Fischer article and the Ghadimi patent were properly considered the most pertinent prior art.

As Travenol correctly argues, the 1974 Fischer article plainly suggests that "the approach to total parenteral nutrition in patients with hepatic disease should include the normalization of plasma amino acid patterns." In view of the abnormal plasma amino acid pattern arising in liver disease, Fischer states that normalization of such patterns would be "beneficial." Ghadimi suggests the monitoring and adjustment of the plasma amino acid levels in formulating amino acid preparations for intravenous administration. Ghadimi also discloses that

> In the present state of knowledge it is not known exactly what level of free amino acids in the blood should be considered toxic. The magnitude of the problem becomes apparent when it is realized that "toxic effect" means long-range effects on the growing brain and hence subnormal brain function or even gross mental retardation not amenable to therapy by the time the long-range effect is detectable by conventional techniques.

The "toxic" effects addressed by Ghadimi, however, are not the same problems to which the Fischer '529 patent is directed.

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[17] *See supra* text accompanying note 15.

[18] *Graham* v. *John Deere Co.*, 383 U.S. 1, 17–18, 148 USPQ 459, 467 (1966).

While Ghadimi observed that "infusion of branched-chain amino acids (leucine, isoleucine, valine) substantially in excess of minimal or even 'safe' requirements (double the minimum) did not result in unduly raised amino acids in the plasma," there is no recognition in the Ghadimi patent that a formulation with a high ratio of branched chain to aromatic amino acids, such as that claimed by Fischer, would be beneficial to patients with severe liver disease. The failure of that infusion to raise plasma amino acid levels a certain degree suggested to Ghadimi only that the metabolic pathways of these amino acids lie outside the liver.

The Ghadimi patent is directed to providing adequate nutritional support to patients of all ages, without regard to liver disease. The claimed Fischer formulation is not disclosed by Ghadimi and is directed to a different class of users with specific unique nutritional problems. The 1974 Fischer article discloses no specific formulation. It suggests only that, in general, normalization may be beneficial. It does not, however, direct one how to proceed in developing an amino acid formulation that would result in normalized plasma amino acid levels while avoiding the risk of hepatic encephalopathy. In view of the mystery enshrouding hepatic encephalopathy, the Commission found that it was not clear that the concept would work. The Commission recognized that "obvious to try" is not a legitimate test of patentability under section 103.[19]

The level of ordinary skill in the art was found to be high, a finding repeatedly emphasized by Travenol in its brief on appeal. Travenol disputes that one possessing such a high level of skill would have found the technique or normalization unpredictable. The record clearly establishes that the prevailing wisdom at the time of the invention was that patients with hepatic encephalopathy were not fed protein for *any* reason, because it made their conditions worse. These patients were thought to be intolerant of protein. American's expert witness testified that, given the lack of background information on the causes of liver disease, normalization was unpredictable at the time of Fischer's invention. Thus, the Commission's finding is supported by substantial evidence.

Travenol also asserts that American failed to show any new and surprising result and that the Commission erred in accepting the alleged criticality of the claimed ranges. The burden of proving invalidity, however, was on Travenol. American is under no compulsion either to prove a new and surprising result or to prove the criticality of the claimed ranges of amino acids. Rather, the burden was on Travenol to establish the lack of new and surprising results or the lack of criticality. Travenol failed to prove either.

We hold that the Commission did not err in concluding that the Fischer '529 patent is not invalid for obviousness under section 103.

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[19] *In re Pantzer*, 341, F.2d 121, 124, 144 USPQ 415, 417 (CCPA 1965).

Enforceability

Travenol contends that American committed inequitable conduct by virtue of American's alleged breach of the duty of candor during prosecution of the Fischer '529 patent. The Commission found that, while at least one misrepresentation and a number of omissions were made during prosecution, none of these was material. Thus, no inequitable conduct was found. The legal standard of materiality applied by the Commission is cited by Travenol as error.

We agree that the Commission did not apply the standard of this court as set out in *Driscoll* v. *Cebalo.*[20] Because of the discussion of the issue of enforcement there, and because of our disposition of this appeal on the basis of noninfringement, we see no need to examine the issue of enforceability *de novo.*

Infringement

American did not allege literal infringement but, rather, alleged that Travenol infringes the asserted claims under the doctrine of equivalents. The Commission, however, declined to find infringement. The same result was found to be achieved by both the claimed product and Travasorb Hepatic—providing adequate nutrition to patients with severe liver disease who cannot tolerate normal proteins without suffering hepatic encephalopathy. However, Travenol was not found to use substantially the same means to achieve that result.

While Travenol copied the high ratio of branched chain amino acids to aromatic amino acids from the Fischer '529 patent, the molar ranges of five amino acids in the Travenol formulation fall below the claimed ranges.[21] The Fischer '529 patent teaches that the ratios of all 19 amino acids to each other should be maintained. Subsequently, as knowledge in the art advances, some of Fischer's claimed ranges were found to be too stringent. The Commission concluded, however, that the asserted claims could not be expanded by the doctrine of equivalents "as new information becomes available, and it is learned which ingredients and ratios in the formulation are important and which are not." The Commission found further that the proportions of many of the amino acids were changed in accordance with the competing ammoniagenic theory of treatment of hepatic encephalopathy.

American correctly contends that the Commission erred in determining equivalence at the time of invention without regard to subsequent developments in the art. In American's view the levels of several amino acids of Travasorb Hepatic falling below the claimed ranges would not impair the function of the alleged infringing

[20] *Driscoll* v. *Cebalo,* 731 F.2d 878, 884, 221 USPQ 745, 750 (Fed. Cir. 1984).

[21] The molar concentrations of threonine, alanine, proline, serine, and glycine in Travasorb Hepatic are below the molar ranges claimed in claim 1 of the Fischer patent. Of these, only threonine is essential. *See supra* note 2. Threonine, serine, and glycine were identified among the most ammoniagenic amino acids in a 1973 paper by Dr. Rudman. *See supra* note 7.

product. American also argues that the Commission erred in restricting the claims in view of the prior art and in comparing Travasorb Hepatic to American's Hepatic-Aid, rather than to claim 1. American urges that the evidence compels a finding of infringement.

Travenol, however, argues that the claims are narrow and that the prior art is more pertinent to the claimed invention than is Travasorb Hepatic. Relying on Dr. Fischer's testimony regarding risk to the patient of formulations outside of the claimed ranges, Travenol asserts that there is no equivalence.

The Commission defends its finding of no infringement by accurately focusing on the difference in means between the claimed and the alleged infringing formulations. Citing the uncertain state of current knowledge of the mechanisms of hepatic encephalopathy, the Commission urges that American has failed to meet its burden of proof on infringement.

A finding of infringement under the doctrine of equivalents is a finding of fact.[22] Accordingly, we must affirm the Commission's finding unless it is unsupported by substantial evidence.[23]

The Commission recognized that the critical questions in this case with regard to infringement were "whether substantially the same ingredients achieve substantially the same results in substantially the same way, whether those with ordinary skill in the art would recognize certain ingredients as the equivalents of one another, and whether certain ingredients are not an essential part of the claimed invention." Contrary to American's assertion, the Commission assessed infringement with respect to the asserted claims, not American's commercial product.

Using a "common factor" approach to derive a comparable sample of Travasorb Hepatic to test against claim 1, the Commission found that Travasorb Hepatic fell outside of the claimed amino acid ranges with respect to 5 of 19 amino acids.[24] Of these, four—serine, alanine, proline, and glycine—are classified by Rose as nonessential. Thus, the lower-than-claimed levels of these nonessential amino acids would not impair the nutritional value of the formulation. Threonine, however, is classified by Rose as essential and, for that reason, its concentration in Travasorb Hepatic could have been considered to impair the nutritional value of the formulation at the time of the invention.

Subsequently, however, research revealed that the minimum requirement of threonine was much lower than the range claimed by Fischer. The Commission recognized that this was not known at the time of the invention and held that the scope of the claims of the Fischer patent cannot be read to cover subsequent advances. That conclusion is contrary to this court's precedent.

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[22] *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 339 U.S. 605, 609, 85 USPQ 328, 331 (1950); *Thomas & Betts Corp.* v. *Litton Sys., Inc.*, 720 F.2d 1572, 1579, 220 USPQ 1, 6 (Fed. Cir. 1983).

[23] *See supra* text accompanying note 15.

[24] *See supra* note 20.

In *Hughes Aircraft Co.* v. *United States*,[25] this court, as had the Court of Claims,[26] held that variations in the invention, made possible by subsequent advances in the art, do not allow the accused infringing device to escape the "web of infringement." An appropriate range of equivalents may extend to post-invention advances in the art in an appropriate case.

As the Commission noted, the specification of the Fischer '529 patent teaches (1) that the relationships among amino acids set forth in the chart in claim 1 is important *and* (2) that the ratio of branched chain amino acids to aromatic amino acids is important. Travasorb Hepatic falls literally within the claimed range of ratios of branched chain amino acids to aromatic amino acids. The specification expressly teaches that, while the inclusion of nonessential amino acids is desirable, the formulation may include only essential amino acids. The level of threonine in the claimed formulation is maintained in a specific range not for reasons associated with the ratio of branched chain amino acids to aromatic amino acids but, rather, for nutritional reasons. Thus, subsequent advances in the prior art, indicating that less threonine is needed for nutritional purposes than previously had been thought, are consistent with the specification. The Commission erred in holding that subsequent advances could not be included within the scope of protection afforded the asserted claims. That error, however, does not merit reversal.

In view of our disposition of the remaining question—whether Travasorb Hepatic works in substantially the same way as the claimed invention—we need not, and do not, decide whether the Commission's finding, that Travasorb Hepatic and the claimed formulation do not perform substantially the same function, is unsupported by substantial evidence.

The difference in threonine levels is significant for another reason. Threonine is identified by Dr. Rudman in his 1973 article as among the most ammoniagenic amino acids. The Commission found the theory, that ammonia causes hepatic encephalopathy, has continuing vitality and found that many of the amino acids whose proportions in Travasorb Hepatic were changed by Travenol are important in their effect on ammonia. Fischer testified that he thought the ratio of branched chain amino acids to aromatic amino acids was critical to this invention and was the key to hepatic encephalopathy. Fischer recognized however that there was no certainty with respect to knowledge about the causes of hepatic encephalopathy. The record clearly establishes that the cause and mechanism of hepatic encephalopathy were, and remain, unknown.

In view of that uncertainty, the Commission could readily have concluded that American failed to meet its burden of proving in-

[25] *Hughes Aircraft Co.* v. *United States*, 717 F.2d 1351, 1365, 219 USPQ 473, 483 (Fed. Cir. 1983).

[26] *Bendix Corp.* v. *United States*, 600 F.2d 1364, 1382, 24 USPQ 617, 631 (Ct. Cl. 1979); *Decca Ltd.* v. *United States*, 544 F. 2d 1070, 1080–81, 191 USPQ 439, 447–48 (Ct. Cl. 1976); *Eastern Rotorcraft Corp.* v. *United States*, 397 F.2d 978, 981, 154 USPQ 43, 45 (Ct. Cl. 1968).

fringement. The record establishes the continued vitality of the competing theory of treating hepatic encephalopathy—reducing the levels of ammoniagenic amino acids. While we do not adopt the Commission's reasoning, we conclude that the Commission's finding, that Travasorb Hepatic does not infringe the asserted claims of the Fischer '529 patent under the doctrine of equivalents, is supported by substantial evidence.

Conclusion

In summary, the asserted claims of the Fischer '529 patent are not anticipated by the Ghadimi patent, nor are they invalid for obviousness under section 103 in view of the 1974 Fischer article or the Ghadimi patent, either alone or in combination. We conclude that the Commission's finding that the asserted claims of the Fischer '529 patent are not infringed under the doctrine of equivalents is supported by the substantial evidence. In view of the competing "ammoniagenic" theory of hepatic encephalopathy, American did not meet its burden of proof in demonstrating that Travasorb Hepatic functions in substantially the same way as the claimed formulation. Accordingly, we sustain the Commission's determination that Travenol has not violated 19 U.S.C. § 1337.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
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Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 84-105)

OAK LAMINATES D/O OAK MATERIALS GROUP, PLAINTIFF. *v.* THE UNITED STATES, DEFENDANT

Court No. 81-8-01084

Before: RE, *Chief Judge.*

COPPER CLAD LAMINATES

Copper clad laminates were classified by the Customs Service as "articles not specially provided for, of rubber or plastics * * * other," under item 774.55 of the TSUS, and assessed with duty at the rate of 8.5% ad valorem. Plaintiff contested the classification claiming that the imported laminates were "articles not specially provided for, wholly or almost wholly of reinforced or laminated plastics," and properly classifiable under item 770.05, duty-free under the Generalized System of Preferences.

Held: Since plaintiff did not overcome the presumption of correctness which attaches to the government's classification, and since the court holds that the imported merchandise was properly classified, the action is dismissed.

[Judgment for defendant.]

(Decided September 25, 1984)

Barnes, Richardson & Colburn (*David O. Elliott* and *Richard Haroian* at the trail and on the brief) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Deborah E. Rand* at the trail and on the brief) for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Taiwan, and described on the customs invoice as "copper clad laminates."

The imported copper clad laminates are used to manufacture printed circuit boards, and consist of two types: (1) *FR 4,* comprised of eight plies of woven fiberglass fabric impregnated by epoxy resin, and (2) *Oak 910,* comprised of three plies of non-woven fiberglass fabric placed between two plies of woven fiberglass fabric, and impregnated by epoxy resin. In addition, copper foil is added on both sides of the FR 4 and Oak 910 laminate sheets.

The merchandise was classified by the Customs Service as "articles not specially provided for, of rubber or plastics * * * other,"

under item 774.55 of the Tariff Schedules of the United States (TSUS). Therefore, it was assessed with duty at the rate of 8.5% ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item 770.05, TSUS, as "articles not specially provided for wholly or almost wholly of reinforced or laminated plastics," duty-free under the Generalized System of Preferences.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified Under:

Schedule 7, Part 12, Subpart D

Articles not specially provided for, of rubber or plastics:

* * * * * * *

774.55	Other.....	8.5% ad valorem.

Claimed Under:

Schedule 7, Part 12, Subpart A

Articles not specially provided for wholly or almost wholly of reinforced or laminated plastics:

Laminated:

774.05	Plates or Sheets (under the Generalized System of Preferences).	Free.

Specifically, therefore, the question presented is whether the imported merchandise consists of "articles not specially provided for, of rubber or plastics * * * other," as classified by Customs, with a duty rate of 8.5% ad valorem, or plates or sheets "almost wholly of reinforced or laminated plastics," duty-free under the Generalized System of Preferences.

After careful examination of the imported merchandise, the testimony of the witnesses, and the entire record, it is the determination of the court that the plaintiff has not overcome the presumption of correctness which attaches to the Customs Service's classification of the imported merchandise. *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878, *reh'g denied,* No. 83-1108 (Fed. Cir. July 17, 1984); *E. R. Hawthorne & Co.* v. *United States,* 730 F.2d 1490 (Fed. Cir. 1984).

At trial, plaintiff called two witnesses familiar with the manufacture of laminates for the printed circuit board industry. Plaintiff's first witness, Dr. Jiri Konicek, holds a Ph.D. in Thermal Chemistry and a M.S. in Physical Chemistry. He has substantial experience in the printed circuit board industry, holds several patents that relate

to printed circuit board technology, and is currently Vice President of Research and Product Engineering at plaintiff's company, Oak Materials Group.

In his testimony, Dr. Konicek traced the evolution of electric circuit technology, and highlighted the role copper has played in that evolution. In earlier times, according to Dr. Konicek, copper served two purposes: (1) to provide the transfer of current from component to component, and (2) to provide a strong bond or good adhesion between the conductive lines and the laminate core. As electric circuit technology developed, a process was created to produce conductive patterns on both sides of a laminate core, and to connect them by plating. This process, as stated by Dr. Konicek, entailed placing copper foil on both sides of a plastic laminate sheet. In addition, in order to connect the circuit patterns on either side of the sheet, it was necessary to drill holes through the board, and deposit an electrical conductor in those holes where no copper was present. The depositing of copper in the holes necessarily involved adding copper to the surface of the copper foil already present. Dr. Konicek stated that, since the total current transfer can be accomplished by the plated-on copper, it is his belief that the conductive property of the original copper foil is no longer necessary. Therefore, he stated that since it is no longer necessary to have the copper foil provide a current transfer function, it is the laminate core that is indispensable in the manufacture of printed circuit boards.

Dr. Konicek also explained how circuit boards can be manufactured from unclad laminates, *i.e.*, laminates which do not contain copper foil. He stated that the unclad laminates must go through a process, either semi-additive or fully additive, which requires the purchasers of unclad laminates to apply the cooper. Dr. Konicek concluded his testimony by stating that, since the laminate core contains all the components, and provides all the insulating properties of circuit boards, the laminate core is the essential element of the article.

Plaintiff's second witness was Mr. Herbert Allen, Manager of Research and Development for the Advanced Circuitry Division of Litton Industries in Springfield, Missouri, a company engaged in the manufacture of printed circuit boards for the retail market.

Mr. Allen testified that his company purchases both clad and unclad laminates from the plaintiff. He stated that printed circuit boards manufactured from clad and unclad laminates are commercially interchangeable, and indicated that his company had sold printed circuit boards made from both types of laminates to several customers. Mr. Allen also testified that the purpose of the copper foil is to obtain good adhesion between the plated-on copper and the surface of the laminate core. He stated that this function could be performed by some other materials such as phenolic resin, nickel, aluminum, or silver. In Mr. Allen's opinion, it is the plastic

core, not the copper foil, that is indispensable in the manufacture of a printed circuit board.

In this case, the defendant did not merely rely on the statutory presumption of correctness that prevails in customs classification cases. It introduced persuasive expert testimony to refute the testimony of plaintiff's witnesses, and to prove that the merchandise was properly classified by Customs. *See Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, 24, 468 F.Supp. 1318, 1326, *aff'd* 67 CCPA 32, C.A.D. 1239, 612 F.2d 1238 (1979); *Ameliotex, Inc.* v. *United States,* 77 Cust. Ct. 72, 84, C.D. 4673, 426 F.Supp. 556, 564 (1976), *aff'd,* 65 CCPA 22, 565 F.2d 674 (1977).

The defendant called two witnesses familiar with the printed circuit board industry, Dr. Richard J. Jablonski and Dr. Joseph Bucci. Dr. Richard J. Jablonski holds a B.S. in Chemistry and a Ph.D. in Organic Chemistry, and is Manager of Technology Development for the Laminates Division of the General Electric Company. His duties include the development of copper clad laminates, the maintenance of the specifications for raw materials used in the production of laminates, and the resolution of customer problems relating to purchased laminates.

Dr. Jablonski rejected the proposition, offered by plaintiff's witness, that the copper foil is merely an adhesive. He stated that no one in the industry considers this to be the function of the copper. He also stated that the purpose of a printed circuit board is to conduct electricity, and that, of all the raw materials or components present in the laminate, only copper has the ability to conduct electricity. Dr. Jablonski also offered extensive testimony on the importance of copper in the manufacture of the laminates. He stated that, while plaintiff's witness testified that it is theoretically possible to use metals other than copper in electric circuitry, the only other metal used, nickel, is used in negligible amounts. Thus, Dr. Jablonski concluded that copper is the predominant metal used in manufacturing printed circuit boards.

Dr. Jablonski also discussed the other types of boards available, *i.e.,* unclad laminates put through a fully or semi-additive process, but noted that these processes are not uniformly available, since they require the printed circuit board manufacturer to be a licensee of either the Photocircuit or Litton companies. He added that General Electric, which holds a prominent place in the laminates business, terminated its manufacture of other types of circuit boards because they were not profitable, and did not produce circuitry with the same performance level as copper clad laminates.

The defendant's second witness, Dr. Joseph Bucci, holds a Ph.D. in Solid State Physical Chemistry, has extensive experience in the electronics field, and is Manager of Market Development for the Foil Division of Gould, Incorporated. Gould manufactures the copper foil used on copper clad laminates. Dr. Bucci's testimony pertained to the production of copper foil. He stated that numerous

precautions are taken to ensure the purity of the copper used to make the foil. For example, foil consistency, strength, and surface smoothness are determined when the copper is in the liquid phase. In addition, different chemical additives are used at a latter stage to achieve the various physical properties of the copper foil. Finally, Gould applies a brass treatment or "thermal barrier" to the copper to prevent it from breaking down, and from making contact with the epoxy resin. Dr. Bucci concluded, therefore, that since the copper applied through the semi-additive or fully additive process does not possess the same properties as the copper foil, the copper foil serves a special function and is not merely an adhesive.

As in all customs classification cases, plaintiff has the burden of overcoming the statutory presumption of correctness which attaches to the government's classification. 28 U.S.C. § 2639(a)(1) (1982). In determining whether the presumption has been rebutted, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878, *reh'g denied,* No. 83-1108 (Fed. Cir. July 17, 1984).

In this case, plaintiff contends that the merchandise was incorrectly classified by customs, and is properly classifiable under item 770.05, TSUS, as "articles not specially provided for wholly or almost wholly of reinforced or laminated plastics." It is plaintiff's contention that the testimony offered establishes that it is the plastic laminate core which imparts the "essential character" to the imported articles, and, therefore, the imported articles are "almost wholly of" plastic.

To determine whether plaintiff's merchandise is "almost wholly of" laminated plastics, the court must examine General Headnote 9(f)(iii) which defines the phrase "almost wholly of" as follows:

> (iii) "Almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the fact that qualities of some other material or materials may be present; * * *.

Id.

The meaning of the phrase "almost wholly of" was first judicially construed in *United China & Glass Co.* v. *United States,* 61 Cust. Ct. 386, C.D. 3637, 293 F.Supp. 734 (1968). The merchandise in *United China* consisted of a glass water ball mounted on a plastic base with an insert made of artificial flowers. Plaintiff claimed that the articles were "almost wholly of" plastic, and therefore, were dutiable under item 748.20 of the tariff schedules. In holding that the "glass water balls" were not "almost wholly of" plastic, the court noted that, in order for the articles to be "almost wholly of" plastic within General Headnote 9(f)(iii), the plastic must be the material which imparts the "essential character" to the article. The court found that the essential character of the article was im-

parted by the glass ball, and made the following pertinent observations:

> The character of an article is that attribute which strongly marks or serves to distinguish what it is. Its essential character is that which is indispensable to the structure, core or condition of the article, *i.e.,* what it is. Webster's Third New International Dictionary, 1966 edition. The article, exhibit 1, has several distinguishing characteristics, namely, the glass ball and decorative insert of plastic flowers. * * *
>
> The indispensable and distinguishing part, that which imparts the essential character of the structured article in this litigation is, in our opinion, the glass ball. We say this because, if we take the glass ball away, we are left with (1) some plastic flowers set in a rubber cap and (2) a plastic base, neither of which has any utility, so far as the record shows, without the glass ball. Indeed, any decorative insert could quite easily be substituted in place of the plastic flowers without destroying the essential character of the article as manifest in the glass ball.

293 F.Supp. at 737.

In *Larry B. Watson Co. a/c Decoration Products Co.* v. *United States,* 64 Cust. Ct. 343, C.D. 4001 (1970), the merchandise consisted of polyvinyl chloride film, colored or "metallized" on one or both sides. The court held that, since the essential character of the merchandise was imparted by plastic, it was "almost wholly of" plastic. In declining to adopt the defendant's position, that the essential character was imparted by the article's shiny finish, the *Watson* court stated that:

> The uncontradicted testimony reveals clearly that the characteristics of the imported film which make it desirable for the manufacture of decorations are its flexibility, its ease of die cutting and the fact that it is flameproof. These are the features or characteristics which distinguish it from other merchandise used for the same purpose, and these qualities are imparted by the polyvinyl chloride. If the color lacquer of metallic deposit were removed, or not added to the finished product, one would still have a basic raw material that could be fully utilized for the manufacture of decorations. Without minimizing the importance of the lacquer, it may be pointed out that the coloring could be added after the importation, and that the reason it is imported colored "is a matter of economics", *i.e.,* "it is cheaper."

64 Cust. Ct. at 350.

In the case at bar, plaintiff contends that, since the color lacquer used in *Watson* is analogous to the copper foil, *Watson* is controlling here. The court does not agree. It is apparent from the facts of *Watson* that the polyvinyl chloride was usable with or without coloring, and that the coloring could have been added after importation. In this case, however, because of the composition of the lam-

inate core, it is virtually impossible to add the copper after importation. This is due to the fact that the core's capability to receive copper results from the addition of ingredients or components not present in the imported merchandise. In other words, in order for an unclad core to have copper added after importation, it must have a different composition than the core of the imported merchandise. Thus, the *Watson* case is clearly distinguishable, and does not support plaintiff's contention.

The court has also reviewed *A.N. Deringer, Inc.* v. *United States,* 66 Cust. Ct. 378, C.D. 4218 (1971) and *Canadian Vinyl Industries, Inc.* v. *United States,* 76 Cust. Ct. 1, C.D. 4626 (1976), *aff'd,* 64 CCPA 97, C.A.D. 1189, 555 F.2d 806 (1977) cited by the plaintiff. A close study of those cases, however, will reveal that they are of little assistance, since they were decided on the particular facts of each case.

A more pertinent and helpful case is *Marshall Co.* v. *United States,* 67 Cust. Ct. 316, C.D. 4291, 330 F.Supp. 643 (1971). In *Marshall,* the question presented was whether a rayon fabric with rubber coating was properly classifiable as "flexible strips, almost wholly of rubber." The merchandise in *Marshall* was used in the manufacture of gaskets, washers, packing heads and diaphragm material. The court observed that the fabric portion gave strength and stability to the merchandise, and found that these qualities were *"equally essential"* to those imparted by the rubber. Thus, the court held that, since the rubber did not impart the essential character to the imported merchansise, the rayon fabric was not "almost wholly of rubber."

In determining whether an article is "almost wholly of" a particular substance, the court "may rely upon and accord great weight to expert testimony." *Kimball Systems, Inc.* v. *United States,* 80 Cust. Ct. 54, 60, C.D. 4738 (1978). In the present case, the four witnesses were clearly qualified to discuss the nature and properties of the imported merchandise. The court, however, places greater reliance upon the testimony of the defendant's experts. Dr. Jablonski and Dr. Bucci exhibited full mastery of the subject, and presented clear and convincing testimony as to the importance of the copper foil in the imported merchandise.

When dealing with highly technical processes, it may be useful to refer to other related items which serve to highlight the relevant aspects of the article in question. Nevertheless, the plaintiff relied too heavily upon merchandise not in question. Specifically, plaintiff employed the use of unclad laminates in an attempt to prove the essential nature of the plastic core, yet the testimony clearly showed that unclad laminates have a different core than copper clad laminates. Similarly, laminates which use a semi-additive or fully additive process also played a prominent role in plaintiff's argument. Once again, however, the testimony clearly illustrated that these technologies are not utilized in the imported mer-

chandise. Hence, the testimony of Dr. Jablonski and Dr. Bucci clearly refuted plaintiff's contention that it is the plastic laminate core which is the indispensable or essential element of the imported merchandise.

The court has meticulously searched the record for proof that one element, more than any other, may be said to be essential. Such a finding could not be made. It is clear from the testimony, and the merchandise itself, that the plastic laminate core and the copper foil, like the fabric and rubber of the *Marshall* case, are of equal importance or "equally essential." As Dr. Jablonski testified:

> [A] better word for a laminate might be composite. * * * In a laminate, we are making a composite of raw materials. We are putting them together someway and we are going to manufacture a product which we call a laminate, and the reason we do that is that we want to make a new composite structure that has properties that are not available from either of the raw materials or the individual components themselves.

A composite, from the latin *componere*, "to put together," clearly refers to anything made up of separate parts. The meaning of this definition is reflected in *Eutectic Corp.* v. *Metco Inc.*, 418 F.Supp. 1186 (E.D.N.Y. 1976), a patent case, in which the court stated that:

> The term "composite" as used herein is intended to designate a structurally integral unit and does not include a mere mixture of components which may be physically separated without any destruction of the structure. Thus, in the case of powder, the term "composite" does not include a simple mixture of individual granules of the separate components, but requires that each of the individual granules contain the separate components which will exothermically react, forming intermetallic compounds.

418 F.Supp. at 1208.

That a composite article can be considered one "essential element" is not novel. Indeed, it was stated along ago that:

> [E]verything existing is either simple or composite. Now simple things are neither actually nor potentially divided, whilst composite things do not exist as long as their constituent parts are divided but only after these parts have come together to compose the thing. Clearly then everything's existence is grounded in indivision.

Thomas Aquinas, *Summa Theologiae*, q. XI, art. I (T. McDermott trans. 1969).

The record leaves no doubt that "copper clad laminate" is a composite article, properly described as composed of a plastic laminate core and copper foil. Without the plastic core there is no product known as a "copper clad laminate." Without the copper foil, for all intents and purposes, there is no product that is a copper clad laminate. The essence or being of a copper clad laminate consists of

the indivision of these two elements. The evidence presented establishes clearly that, even though the plastic core is an essential component of the imported article, the copper foil is also *"equally essential."* The court finds no merit in plaintiff's argument that the plastic core is the essential element of the article. The imported merchandise, therefore, is not classifiable as plates or sheets "almost wholly of reinforced or laminated plastics," admissible duty-free under the Generalized System of Preferences.

For the foregoing reasons, it is the determination of the court that the presumption of correctness which attaches to the government's classification has not been overcome. Since the court holds that the imported merchandise is properly classified as "articles not specially provided for, of rubber or plastics * * * other," under item 770.05 of the tariff schedules, plaintiff's claim is denied and the action is dismissed.

Judgment will enter accordingly.

(Slip Op. 84-106)

NEC AMERICA, INC., PLAINTIFF, *v.* THE UNITED STATES, DEFENDANT

Court No. 83-3-00419

Before RE, *Chief Judge.*

Paging Devices

Battery-operated paging receivers which receive information transmitted over a pre-set radio frequency, emit an alerting tone, and convert the radio frequency signal through a code to visible digital information on liquid crystal diode displays, were properly classified as "other solid-state (tubeless) radio receivers" under item 285.25 TSUS.

Held: Since the imported devices perform the three essential functions of a radio receiver, *i.e.,* selectivity, amplification, and detection, and receive and covert radio waves into perceptible signals, they fall within the accepted definition of radio receivers.

[Judgment for defendant.]

(Decided September 25, 1984)

Glad, White & Ferguson (*Edward W. Glad* at the trial and on the brief), for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade office, Commercial Litigation Branch (*Michael P. Maxwell* at the trial and on the brief), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan, and described on the customs invoice as "paging receivers."

The merchandise was classified by the Customs Service as "other solid-state (tubeless) radio receivers" under item 685.24 of the Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty at a rate of 8.8 per centum ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item 685.70, TSUS, as "indicator panels and other sound or visual signalling apparatus" dutiable at a rate of 3.5 per centum ad valorem.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 6, Part 5:

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:

* * * * * * *

Radiotelegraphic and radiotelephonic transmissoin and reception apparatus; radiobroadcasting and reception apparatus, and parts thereof:

* * * * * * *

Other:

Solid-State (tubeless) radio receivers:

* * * * * * *

685.24	Other	8.8% *ad val.*

Claimed under:

Schedule 6, Part 5:

685.70	Bells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus, all of the foregoing which are electrical, and parts thereof.	3.5% *ad val.*

The question presented is whether, within the meaning of the tariff provisions, the imported merchandise is dutiable as "other solid-state (tubeless) radio receivers," as classified by Customs, or as "Indicator panels and other sound or visual signalling appara-

tus," as claimed by plaintiff. In order to decide this issue, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 733 F2d 873, 878, *reh'g denied,* No. 83–1108 (Fed. Cir. July 17, 1984).

After an examination of the merchandise, relevant case law, lexicographic definitions, and testimony of record, it is the determination of the court that the plaintiff has not overcome the presumption of correctness that attaches to the government's classification. 28 U.S.C. § 2639(a)(1) (1982); *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 876, *reh'g denied,* No. 83–1108 (Fed. Cir. 1984); *E.R. Hawthorne & Co.* v. *United States,* 730 F.2d 1490, 1490 (Fed. Cir. 1984).

The imported paging receivers are small electrical devices which are pre-set to a certain radio frequency channel. The pagers are battery-powered and have liquid crystal diode visual display (LCD) units with a ten digit capacity. They are activated by means of a 3-motion switch. When the switch is turned, the pager emits a tone and the liquid crystal display is illuminated to indicate that it is operational.

When reset, the pager is activated by a binary digital code transmitted over the pre-set radio channel. The radio signal is received by the pager, detected, and sent to a decoding device which activates the paper. When activated, the pager generates a tone and presents numerical information on a visual display LCD. The device converts binary information received through the radio frequency into digital information on the LCD. The pager can thereby receive information such as telephone numbers, stock quotations, or coded messages. It also has a memory capability which allows it to store and recall messages.

In attacking the Customs Service's classification of the paging receivers, it is plaintiff's principal contention that a radio receiver necessarily requires a tuner, that is, a device that enables the user to select more than one frequency, as well as an audio amplifier.

In order to determine whether the imported paging devices are radio receivers, the court must ascertain the precise meaning of "radio receivers," as used by Congress in the tariff schedules. The meaning of a tariff term "is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary." *Bentkamp* v. *United States,* 40 CCPA 70, 78, C.A.D. 500 (1952), quoted with approval in *Rohm & Haas Co.* v. *United States,* 727 F.2d 1095, 1097 (Fed. Cir. 1984). It is well established that the "common meaning of a tariff term is not a question of fact but a question of law." *Schott Optical Glass, Inc.* v. *United States,* 67 CCPA 32, 34, C.A.D. 1239, 612 F.2d 1283, 1285 (1979).

The tariff schedules are written in the language of commerce, and the terms used are to be given their commercial or common meaning. *See Ameliotex, Inc.* v. *United States,* 65 CCPA 22, 25, C.A.D. 1200, 565 F.2d 674, 677 (1977); *Esco Mfg. Co.* v. *United*

States, 63 CCPA 71, 73, C.A.D. 1167, 530 F.2d 949, 951 (1976). Accordingly, the court must examine the lexicographic definitions, as well as the testimony given at trial, to determine whether the paging devices are radio receivers.

"Radio receiver," as used in item 685.24, is an *eo nomine* designation. In the absence of a demonstrated legislative intent to the contrary, an *eo nomine* designation of an article will include all forms of the article. *See, e.g., Pistorino & Co., Inc.* v. *United States,* 82 Cust. Ct. 168, 177, C.D. 4799 (1979), quoting *Nootka Packing Co.* v. *United States,* 22 CCPA 464, 470, T.D. 47464 (1935). It must also be remembered that the tariff statutes were enacted "not only for the present but also for the future, thereby embracing articles produced by technologies which may not have been employed or known to commerce at the time of the enactment . . . ." *Corporacion Sublistatica, S.A.* v. *United States,* 1 CIT 120, 126, 511 F.Supp. 805, 809 (1981); *see also Davies Turner & Co.* v. *United States,* 45 CCPA 39, 41, C.A.D. 669 (1957).

In the *McGraw-Hill Encyclopedia of Science and Technology,* Vol. 11 (5th ed. 1982), radio receiver is defined as "[t]hat part of a radio communication system which abstracts the desired information from the radio frequency (rf) energy collected by the antenna. All radio receivers must perform three basic functions: selectivity, amplification, and detection." *Id.* at 282.

The *Institute of Electrical and Electronics Engineers Standard Dictionary of Electrical and Electronics Terms* (2d ed. 1977) defines radio receiver as a "device for converting radio-frequency power into perceptible signals." *Id.* at 554.

Radio receiver is defined in *Cooke & Markus, Electronics and Nucleonics Dictionary* (1960) as a device "that converts radio waves into intelligible sound or other perceptible signals." *Id.* at 380.

At trial, plaintiff offered the testimony of Mr. Michael J. McLaughlin, its Manager of Pager Engineering. Mr. McLaughlin has been employed by the plaintiff for six years since his discharge from the Air Force, and holds a third-class F.C.C. license with broadcast endorsement. Although he has taken some courses in radio communications, Mr. McLaughlin does not have a college degree and is not a member of any professional organization in the radio communications industry. On cross-examination, he testified that a radio receiver is a device "which has external tunability, receives radio frequency, and detects them, and puts them through an audio amplifier to an audio output of some type." Although Mr. McLaughlin took issue with most of the lexicographic definitions read to him, he agreed that the paging receivers perform the functions of selection, amplification, and detection, as those terms are defined by the *McGraw-Hill Encyclopedia of Science and Technology.*

Mr. Gerald M. LeBow, owner of Technical Marketing Consultants, Inc., a company that provides technical marketing and sales

information pertaining to the consumer and professional electronics industries, testified for the government. He has extensive and varied experience in the radio broadcasting industry and is a member of a number of professional or trade associations. In addition, he has written papers on radio technology and has a first-class radio telephone license and an amateur radio license from the F.C.C. Mr. LeBow defined radio receiver as a device which performs selection, amplification and detection, and stated that the pagers perform all three of these functions. He further testified that, in his opinion, the receiving pagers would be considered radio receivers within the radio communications industry.

Selectivity is defined as the ability to select a particular frequency from the many radio signals in the atmosphere. The paging devices that are the subject matter of this action perform this function. They are pre-set to receive a particular frequency.

Amplification is the process of increasing the radio frequency energy received by the antenna so that it can be used to generate a signal. Both parties admit that the display paging receivers perform this function.

Detection is the process whereby the radio frequency waves are converted into a signal that can be utilized. This paging units convert radio frequency input, in the form of a binary code, into output in the form of a digital display on the LCD.

Mr. McLaughlin, plaintiff's witness, acknowledged that the paging device performed the three essential functions of selectivity, amplification, and detection. He testified, however, and the plaintiff contends, that a radio receiver must also have a tuner and an audio amplifier. In support of this contention, the plaintiff cites *Audiovox Corp.* v. *United States,* 1 CIT 136, 141 (1981). In *Audiovox,* plaintiff challenged the classification of imported FM converters as solid-state (tubeless) radio receivers designed for motor vehicle installation under item 685.24 of the tariff schedules. The converters were used to adapt motor vehicle AM radios so as to permit FM reception.

The *Audiovox* court found that "[t]he sole function of the FM converter is to receive and then convert FM radio signals into AM radio wave signals." *Id.* at 142. In normal use, the converters could not produce an audio signal by attachment to a loudspeaker. Emphasizing that the converter by itself would be "commercially impractical for use as a radio receiver," the court found that the converters were merely accessories to existing AM receivers in motor vehicles, and not "radio receivers" unto themselves. *Id.* at 143. The holding in *Audiovox* was limited to radio receivers designed for automobile installation which, as the court found, must have audio capability to be commercially practical.

In *Symphonic Electronics Corp.* v. *United States,* 72 Cust. Ct. 211, C.D. 4543 (1974) (*Symphonic I*), AM/FM tuners were classified under item 685.23 as "solid-state (tubeless) radio receivers." *Id.* at

213. Plaintiff claimed that the tuners were "more than" a radio receiver since they were to be used in combination with a phonograph and tape player. The court determined that the common meaning of radio receiver included "tuner-amplifiers which, in addition to receiving radio signals * * *, are capable of controlling and amplifying signals from a record changer and tape player connected by wires to the tuner-amplifier." *Id.* at 217.

In *Symphonic Electronics Corp.* v. *United States,* 77 Cust. Ct. 147, C.R.D. 76–5 (1976) (*Symphonic II*), the court had before it merchandise that was "the same in all material respects" as that considered in *Symphonic I.* On cross-motions for summary judgment, plaintiff alleged that radio chassis were improperly classified as radio receivers because they were lacking a cabinet and loudspeaker, which were urged to be the essential components. The *Symphonic II* court held that there existed a triable issue "concerning the essential components of a radio receiver, as that term is commonly understood in the electronics industry; and concerning whether a stereo 'chassis' or tuner-amplifier of the type represented by the Model R860 was commonly regarded and sold within the trade as a 'radio receiver.' " *Id.* at 153.

All the foregoing cases dealt with products or components of systems designed to receive commercial radio stations that broadcast to the public at large. The factual context of the present case is quite different. To be commercially practical, a receiver designed for commercial entertainment broadcasts requires a tuner in order to select among the frequencies of various radio stations. The class of "radio receivers," however, is not limited to entertainment broadcast receivers, and as an *eo nomine* designation, includes all forms of radio receivers.

At trial, there was uncontradicted expert testimony that other types of radio receivers, such as industrial receivers for use by police and fire departments, or taxis, or "Musak" receivers, are pre-set to one frequency, and have no variable tuning capability. Similarly, commercial broadcast receivers, of course, are designed with an audio capability. Again, however, the class of "radio receivers" is broader than simply commercial broadcast receivers.

There was testimony that other types of radio receivers emit signals other than audio signals. For example, receivers, in radar systems convert radio signals into visual, rather than audio, signals. In addition, utility load management systems and remote control devices convert radio frequency into coded control signals without an audio output. Moreover, the lexicographic definitions do not limit output to sound or audio signals, but refer to "perceptible signals." Thus, a careful reading of *Audiovox, Symphonic I,* and *Symphonic II* reveals that those cases are limited to devices designed to receive radio broadcasts transmitted to the public at large.

In the most recent case on point, *General Electric Co.* v. *United States,* 2 CIT 84, 525 F.Supp. 1244 (1981), *aff'd,* 69 CCPA 166, 681

F.2d 785 (1982), plaintiff challenged the classification of three types of electronic packs (chassis) as unfinished solid-state (tubeless) radio receivers. Plaintiff argued that, since the chassis were missing significant parts such as a power transformer, power cord, and loudspeaker, the chassis were inoperable as radio receivers and, thus, improperly classified. Defendant argued that the classification was proper since "the chassis were capable of performing the basic functions of a 'radio receiver' within the common meaning of that term." *Id.* at 87, 525 F.Supp. at 1246. Therefore, the *General Electric* court stated that "central to the dispute between the parties is a determination of the common meaning of the term 'radio receiver.'" *Id.* at 90, 525 F.Supp. at 1248. The court reviewed the pertinent lexicographic definitions and relevant case law and determined that "the basic functions of a radio receiver are selection, amplification and detection." *Id.* Accordingly, the chassis were held to be unfinished radio receivers as classified by Customs. On appeal, adopting the opinion authored by Judge Newman for the Court of International Trade, the United States Court of Customs and Patent Appeals affirmed. 69 CCPA 166, 167, 681 F.2d 785, 786 (1982).

This Court agrees with the holding in *General Electric Co.* v. *United States,* 2 CIT 84, 525 F.Supp. 1244 (1981), *aff'd,* 69 CCPA 166, 681 F.2d 785 (1982) in which the court defined the basic functions of a radio receiver as selectivity, amplification, and detection. The paging receivers here are self-contained units that select a frequency, amplify it, and convert radio signals into perceptible signals, *i.e.,* visual digital indications on the LCD.

It is also significant to note that the plaintiff's marketing literature, operations and service manuals, invoices and its personnel regularly refer to various display pagers as paging *receivers.* For example, one N.E.C. service manual describes a similar device as "an all solid state double superheterodyne *FM receiver.*" While such descriptions are not conclusive, they are relevant evidence of industry usage, particularly when they contradict the plaintiff's present position in this litigation. *See Lukas American, Inc.* v. *United States,* 7 CIT ——, slip op. 84–55, at 5 (May 24, 1984); *Nomura (America) Corp.* v. *United States,* 62 Cust. Ct. 524, 532–33, C.D. 3820, 299 F.Supp. 535, 542 (1969), *aff'd,* 58 CCPA 82, C.A.D. 1007, 435 F.2d 1319 (1971).

Expert testimony as to the common meaning of a tariff term is, of course, merely advisory. *E.g., Package Machinery Co.* v. *United States,* 41 CCPA 63, 66, C.A.D. 1200 (1977). It is, however, considered probative when supported by lexicographic and technical sources. In this case, the court finds the testimony of Mr. LeBow, the defendant's expert, both credible and persuasive. Mr. LeBow had sound academic credentials, and wide-ranging, practical experience in the radio industry. On the other hand, even apart from academic training, Mr. McLaughlin's experience is limited to work-

ing with non-commercial radio equipment in the Air Force and the California Air National Guard, and his civilian experience with the plaintiff. Mr. McLaughlin seemed to be straining at times, and was forced to quibble or disagree with the definitions read to him. For example, he testified that a radio receiver must directly convert radio signals, rather than convert them indirectly as the paging receivers do. There is no support for this assertion in any of the sources cited. It is well established that conclusory statements by a witness which are based solely on his own opinion have little or no probative value. *See, e.g., Keer, Maurer Co.* v. *United States,* 46 CCPA 110, 115, C.A.D. 710 (1959); *Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, 22-23, C.D. 4783, 468 F.Supp. 1318, 1325, *aff'd,* 67 CCPA 32, C.A.D. 1239, 612 F.2d 1283 (1979).

Mr. LeBow was forthright and straightforward in his testimony, and his opinions were supported by lexicographic and scientific sources. In short, the defendant did not simply rely on the statutory presumption of correctness. Rather, it has submitted competent, reliable and credible affirmative evidence, which the court has found persuasive, to support the Customs Service's classification of the imported merchandise. *See Schott Optical Glass, Inc., supra,* 82 Cust. Ct. at 24, 468 F.Supp. at 1326; *Ameliotex, Inc.* v. *United States,* 77 Cust. Ct. 72, 84, C.D. 4673, 426 F.Supp. 556, 564 (1976), *aff'd,* 65 CCPA 22, 565 F.2d 674 (1977).

The court has considered the plaintiff's contention that the merchandise should be classified under item 685.70, TSUS, which covers electrical "[b]ells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus," and finds it without merit.

It is axiomatic that merchandise which constitutes more than a particular article is not classifiable as that article. *E.g., United States* v. *Flex Track Equipment Ltd.,* 59 CCPA 97, 100, C.A.D. 1046, 458 F.2d 148, 151 (1972); *E. Green & Son (New York), Inc.* v. *United States,* 59 CCPA 31, 34, C.A.D. 1032, 450 F.2d 1396, 1398 (1971). As the Court of Customs and Patent Appeals stated, the rules applying to the "more than" doctrine are general, and "each case must in the final analysis be determined on its own facts." *E. Green & Son (New York), Inc.* v. *United States, supra,* 59 CCPA at 34, 450 F.2d at 1398.

The display paging receivers clearly perform more than a signalling function. Indeed, the device's primary marketing feature that distinguishes it from the tone-only pager, is its superior communication capability. Clearly, signalling is one form of communication-and a great many products or articles of commerce are capable of signalling in some way or another. Classification under item 685.70, TSUS, as "other visual or sound signalling apparatus," however, is limited to those articles whose sole purpose and function is merely signalling. This court has held that "other sound or visual signalling apparatus" must "call attention to temporary or abnor-

mal conditions," *Oxford Int'l Corp.* v. *United States,* 75 Cust. Ct. 58, 68, C.D. 4608 (1978); *see Amersham Corp.* v. *United States,* 5 CIT ——, 564 F.Supp. 813, 825 (1983), or to "a special circumstance," *A & A International, Inc.* v. *United States,* 5 CIT ——, Slip op. 83-42, at 12 (1983).

The capabilities of the imported paging receivers, however, transcend mere signalling. The information that can be received is not limited to temporary or abnormal conditions, or any set of special circumstances. Rather, the device has the capacity to receive any information that can conceivably be reduced to digital form. In addition, the product's ability to store and recall messages also constitutes something more than s signalling function. Thus, a careful analysis of the receiver's capabilities clearly indicates that the article is not properly classifiable under 685.70, TSUS.

Since the imported paging receivers perform the functions of selectivity, amplification and detection, and convert radio waves into perceptible signals, they fall within the accepted definition of radio receivers. It is, therefore, the determination of the Court that the presumption of correctness that attaches to the government's classification has not been overcome.

Since the Court holds that the paging receivers are properly classified as "other solid-state (tubeless) radio receivers" under item 685.24 of the tariff schedules, plaintiff's claim is denied and the action is dismissed. Judgment will issue accordingly.

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DEPARTMENT OF THE TREASURY, *September 25, 1984.*

States Court of International Trade at New York are
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in full, the summary herein given will be of assistance
important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

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